

SAMUEL TOTTEN

*An Oral and
Documentary History*
of the **Darfur
Genocide**



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An Oral and Documentary History of the Darfur Genocide

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SAMUEL TOTTEN

Praeger Security International



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This book is dedicated to my wife, Kathleen M. Barta, for her loving, gracious, and indefatigable support for the work I do in the places I do it, and to all of the black African civilians of Darfur who have lost more than most can imagine as a result of the violence visited upon them by the Government of Sudan, its troops, and the *Janjaweed*.



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Introduction

An Oral and Documentary History of the Darfur Genocide addresses a host of critical issues germane to the scorched earth/genocidal actions which the Sudanese Government has engaged in between 2003 and today (November 2010). The interviewees, all of whom were violently forced from their land, villages, and homes, are an eclectic group: the young and the old, men and women, the uneducated and the highly educated, common citizens, and leaders (sheiks and *umdas*). Their personal stories place a human face on a crisis that has resulted in the genocide of some two hundred thousand people and the deaths of scores of thousands due to what has been deemed “genocide by attrition”—the withholding of medical attention and humanitarian assistance to the black Africans (as the people refer to themselves and as they are referred to by Government of Sudan troops and the *Janjaweed*, or Arab militia) as they fled and sought shelter in roughshod internally displaced persons (IDP) camps in the forbidding deserts and mountains of Darfur. (For a detailed explanation of the Darfur crisis, see the “Historical Overview” in this book.)

Expressly for this book, I conducted interviews in three different refugee camps in eastern Chad between 2007 and 2009, in N’djamena (the capital of Chad) in December 2009, and a refugee camp in the Nuba Mountains (near Kauda) in July 2010. All but one of the interviews were conducted in Arabic with the assistance of one of two interpreters, Hussein Adam Idriss and Ramadan Tarjan. I conducted one on my own in English. The average length of each interview was approximately four hours.

Potential interviewees were approached in various ways. In two camps—Gaga and Farchana—I simply walked up and down dusty paths

asking individuals if they would be willing to be interviewed. When a person agreed to be interviewed, we sat down in his/her compound, discussed the purpose of the interviews, and then I conducted the interview. (The one exception was a referral by another researcher in the field who recommended that I meet and interview a refugee who had named his daughter Condoleezza Rice, after and in honor of the U.S. Secretary of State in the presidential administration of George W. Bush.) In the camp on the fringe of the small desert village of Goz Beida, the interviewees were recommended to my interpreter and me by various *umdas* (heads of sections of the refugee camp). We made it known to the *umdas* that we were interested in interviewing a diverse group of individuals, both men and women, from different villages, and they kindly honored that request. In N'djamena, a colleague with whom I had become friends when I was first in Chad in 2004 arranged a series of interviews with a group of individuals with a wide range of experiences. Finally, in the Nuba Mountains, my interpreter and I approached several sheiks and an *umda* in the small refugee camp outside the village of Kauda and asked them if they would recommend potential individuals for us to interview.

At the outset of each interview, the interviewee was informed of the various purposes of the interviews (to publish them in a book of interviews, to use specific information in research papers and a book on the Darfur crisis), asked if he/she agreed to be interviewed for such purposes, and told that I was only interested in what he/she had personally experienced or witnessed. The interviewees were also informed that if they felt it was important to relate something they had heard about from others, then they should make it clear that they were relating secondhand information. Each individual was also informed that he or she could choose to reveal his/her real name in the interview or go by "anonymous" or a pseudonym. Finally, the interviewee was asked if he/she had any questions about any aspect of the interview.

Each interviewee was asked the exact same set of questions. The questions began with basic demographic information about the interviewee: name, date of birth, place of birth, years of education, marital status, and number of children. The interviewees were then queried about their first violent encounters with neighbors or outsiders, who the latter were, when the encounters occurred, and what transpired. The interviewees were asked to provide insights into the causes and ramifications of the conflicts. The interviewees were also asked to provide an account of each conflict he/she experienced through the years, leading up to the time that he/she was forced from his/her village for the last time (or just prior to leaving Sudan for Chad). Follow-up questions posited throughout each interview focused on more detailed explanations of issues/events, the names of individuals or groups, and the spelling of names of individuals/groups/places/organizations, etc.

CARRYING OUT THE INTERVIEWS

My introduction to the crisis in Darfur was up-close and personal. In early July 2004, I was informed by Jerry Fowler, Director of the Committee of Conscience at the United States Holocaust Memorial Museum, that the Washington, D.C.-based Coalition for International Justice (CIJ) was seeking individuals to serve as investigators/interviewers for a project related to the ongoing crisis in Darfur, Sudan. More specifically, CIJ had been hired by the U.S. State Department to assemble a team for the express purpose of collecting data in refugee camps in Chad to ascertain whether the Government of Sudan had perpetrated (and/or was perpetrating) genocide. As a long-time scholar of genocide, I immediately contacted CIJ and stated that I was extremely interested in the prospect of taking part in such an investigation.

Within days of contacting CIJ, I was asked to submit a vita. Days later, I was formally invited to serve as an investigator and informed of the various forms I needed to complete, visa requirements, the type and extent of a physical needed, inoculations and medication required (e.g., a prophylactic for malaria), and equipment needed for the trip (e.g., a lightweight tent, mosquito screen, sleeping bag, sunscreen, small first aid kit, etc.).

Preparing to head to the Chad/Darfur border region was both exhilarating and daunting. It was exhilarating for numerous reasons, including the fact that I would be taking part in an investigation of an ongoing human rights crisis (versus studying about events that had been perpetrated in the past) and thus helping, in a small way, to get the word out about it; conducting interviews with individuals who had very recently lived in Darfur and had firsthand experience of the atrocities and human rights violations perpetrated by Government of Sudan (GoS) troops and the Janjaweed; helping to ascertain whether an ongoing crisis was actually a case of genocide; working with high-powered experts in the fields of law, human rights, and justice; and traveling to a remote and little known (at least to most Westerners) part of the world.

It was daunting for other reasons. We didn't know for sure whether we would be in an area under attack by the GoS and *Janjaweed*; whether we would face torrential rain the entire time (it was the rainy season in Darfur); if we'd be in an area where temperatures were 130 degrees day in and day out (they were in Bahai, where we had a team working); or whether we would constantly have to purify filthy water in order to keep hydrated.

Ultimately, I was assigned to conduct interviews in a refugee camp in Goz Beida, located in southern Chad. Our team—comprising another investigator, Brenda Sue Thornton, a prosecutor with the U.S. Justice Department; our interpreters; a project field coordinator; and our drivers—camped in individual tents in the compound of a decrepit and foul-smelling former French colonial building.

Armed with an eight-page questionnaire designed by the U.S. State Department in conjunction with a host of nongovernmental organizations whose work focuses largely on the protection of international human rights, Brenda Sue Thornton and I each interviewed approximately fifty refugees who had fled the violence in Chad. Altogether, the entire CIJ team conducted more than 1,100 interviews. The interviews generally spanned an hour and a half to two hours, and collected data about the interviewees, and exactly what they personally experienced and witnessed during the attack(s) and on their way to Chad.

Following a careful analysis (by those both inside and outside the U.S. State Department) of the data collected, U.S. Secretary of State Colin Powell declared in a speech to the U.S. Senate Foreign Relations Committee on September 9, 2004 that the U.S. government had concluded the Government of Sudan had perpetrated genocide against the black Africans of Darfur and was possibly still doing so. Upon this declaration, the U.S. government referred the matter to the United Nations (UN), asking it to conduct its own investigation.¹

I was disappointed that the U.S. government seemed to pass the buck to the United Nations, even though what it did by referring the matter to the UN was perfectly legal under the conditions of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNCG). As the UN carried out its own investigation, however, thousands, if not tens of thousands, of people continued to be killed and die as a result of injuries, a lack of medical care, starvation, and dehydration. Thus, I decided to focus all my attention on the alleged genocide in Darfur. Along with Eric Markusen, a fellow genocide scholar who also served as one of the twenty-four investigators with the Atrocities Documentation Project (ADP), I immediately developed a proposal for a book on the ADP and went right to work on the book. At the same time, Markusen and I wrote a chapter for the book on ADP field operations. I also wrote a chapter providing an analysis of the U.S. "genocide decision" and its subsequent actions, and immediately applied for a visa to enter Darfur. Upon the conclusion of the latter book, I began my own book on the Darfur crisis.

Time and again I was stymied in my attempt to obtain a visa to enter Darfur. Finally, a close friend in the Rwandan military offered to pass one of my two passports to Rwanda's ambassador to Uganda so that the ambassador could contact his counterpart from Sudan and request that he, the Sudanese ambassador, provide the visa. After my passport was held for some six months, I received a message from the Sudanese Embassy in

¹ For a detailed discussion and description of the Atrocities Documentation Project, including the genesis of the project, the fieldwork, the analysis of the data, the final decisions based on the data collected by the CIJ/State Department team, and the ramifications of the latter, see Samuel Totten and Eric Markusen, eds. *Genocide in Darfur: Investigating Atrocities in the Sudan* (New York: Routledge, 2006).

Uganda that the Sudanese ambassador to Uganda requested that I fly to Kampala (the capital of Uganda) to explain why I wished to enter Darfur. In light of the fact that I had written a detailed letter regarding my plans in Darfur and sent it along with my passport, it seemed to be another run-around. I chose to forego a trip to Darfur and instead return to the refugee camps in Chad. I figured if I couldn't get in to observe the situation in Darfur and conduct interviews with black Africans in internally displaced camps, then I would do my level best to collect as much information as I could from the black Africans in the refugee camps in Chad and then broadcast it to the world in editorials for various newspapers, research papers published in journals, and a book composed of the interviews.

My first return trip to Chad was scheduled for spring 2006. I obtained a visa, contacted Hussein Adam Idriss, who had served as Brenda Sue Thornton's interpreter back in 2004, and began looking at possible flights. However, in early April I was forced to cancel the trip when Chadian rebels left their sanctuary inside Sudan, raced across the expanse of Chad (over 600 miles), and attacked the Chadian capital of N'djamena. It is estimated that at least 350 people (Chadian troops, rebels, and local citizens) were killed in the melee. I knew there was no way I could make it from N'djamena to eastern Chad if the rebels were active in the area, particularly if I could not get a flight on a UN plane and had to travel by truck.

Due to the somewhat unstable situation in Chad as well as my university commitments, teaching schedules, and publication deadlines I held off making plans to return to Chad until early 2007. Hussein and I decided that spring and early summer would work best for both of our schedules, and thus, I returned to Chad in May and June of 2007 and conducted ten in-depth interviews (each spanned between four and six hours). The interviews were conducted in two different refugee camps, Gaga and Farchana.

The interviews were extremely informative (for specifics, see "Focus of Interviews" below), but I felt the need to return to Chad again in order to conduct interviews with black African survivors from different tribal groups who were living in different camps. Thus, in early 2008, Hussein and I began making plans to visit a different set of camps. As luck would have it, however, the Chadian rebels struck again. This time I lost contact with Hussein, and once again the venture had to be scrubbed. When I finally heard from Hussein in February, he wrote:

Dear Sam, I am sorry that I could not answer immediately to your Message because I was in the camps and the day I came to N'djamena [the capital of Chad] N'djamena was attacked by the rebels so we went through difficult time so you may not believe that our houses became battle field but after all we are all safe. By escaping this disaster we believe that we live longer, so no need for worry about us. We had a problem of communication in the passed 2 weeks but now the situation is returning slowly to the normal so the net and the telephone lines were open 2 days ago. . . . Best wishes, Hussein

Hussein and his family (his wife and young child) had fled across the river and sought sanctuary in Cameroon.

Ultimately, it was more than a year before I could manage to get away from my regular job as a professor at the University of Arkansas, Fayetteville to return to Chad. In December 2009, I returned and Hussein and I headed to Goz Beida, where we had first worked together. In Goz Beida we interviewed six individuals; back in N'djamena, we interviewed six additional refugees. Again, each interview was between four and six hours in length.

Seven months later I decided to travel to the Nuba Mountains (Sudan) in order to interview refugees who had sought sanctuary near the tiny village of Kauda. I managed to fly in with a nongovernmental organization and thus avoided the need to obtain a visa directly from the Government of Sudan. In the Nuba Mountains I interviewed seven refugees from Darfur. Each interview was between four and eight hours in length.

VALUE OF FIRST PERSON ACCOUNTS OF GENOCIDE

First person accounts of genocidal acts are valuable for numerous reasons. First, they serve as testimony to what individuals (and their family members, friends, and community) experienced and witnessed firsthand. They are, as eminent historian Philip Friedman commented, history written from the inside. Second, solid first person accounts provide a powerful and unique means to penetrate deeper into the depths of genocide than many secondary sources. As Holocaust scholar Harry Cargas (1981) said—in relation to the Holocaust but relevant to any genocide—the testimony of survivors comes as close as anything possibly can to assist the rest of humanity in “understanding the ununderstandable” (p. 203). Third, in many cases, eyewitness accounts contain information not found in other documents, be they official government documents issued by the perpetrators or secondary accounts. Such information ranges from little-known incidents, to persons, places, and, as alluded to above, personal perspectives. Personal accounts can thus be used to create documentation where it did not previously exist. Fourth, first person accounts by survivors provide, and constitute, a “counter story” to that of the perpetrators. Fifth, the use of first person testimony in the classroom “moves the study from what is often a welter of statistics, remote places and events, to one that is immersed in the ‘particular’” (Totten 2001, p. 110). Sixth, as I have noted elsewhere, “the power of the individual human story within a persecutive or genocidal situation may

² There are, of course, limitations to first person accounts, be they interviews or oral histories. As memories fade, general events as well as fine details may become confused or lost. Dates, as well as the chronology of certain experiences and events, might be incorrectly reported. Some perceptions may be influenced by commonly accepted notions of what occurred. Concomitantly, some survivors may confuse rumors with reality, while others may inadvertently embellish certain

engage students in a way no other type of information can, in part because of the deeply human aspects—including the passions and emotions—that are communicated” (Totten, 2001, p. 111). Seventh, first person accounts provide material with which to counter, first, the patently false arguments of both the perpetrators, and second, any deniers of the genocide.²

Not surprisingly, the interviews included in *An Oral and Documentary History of the Darfur Genocide* provide many of the benefits noted above. More specifically, they first provide a close-up view of what the black Africans of Darfur have experienced at the hands of Government of Sudan troops and the *Janjaweed*: the innumerable attacks suffered by the black Africans at the hands of the Arab nomads throughout the late 1980s, 1990s, and early 2000s; the disenfranchisement of black Africans by the GoS prior to the genocidal period; the vicious aerial and ground attacks against black African villages; the rapes and gang rapes of black African girls and women; the mass killings of black Africans; the racial slurs issued by GoS troops and *Janjaweed* against the black Africans; and life in the IDP and refugee camps.

Sections of the various interviews also provide unique and penetrating insights into the black Africans’ overwhelming frustration at the lack of justice in Darfur and the preferential treatment given to Arabs over black Africans by the GoS. The interviews also present vivid evidence of the disdain and hatred held by GoS troops and the *Janjaweed* toward the black Africans, and their intent on murdering not only alleged rebels but black African women, children, and babies.

The interviews in this book provide valuable kernels of information either not addressed or rarely touched on in other books about the genocide in Darfur: the massacres carried out in Mukjar, where truckloads of black African men were taken into the desert and executed; the purported dumping of chemicals from GoS airplanes on black African villages; the digging of a gigantic ditch/hole in an area where black Africans were fleeing from attacks on their village and the mass murder of people who unknowingly approached it; and public gatherings in which certain GoS leaders issued calls and threats to exterminate the black Africans.

details and then, over the years, accept them as facts. Similarly, respondents may present information that suffers from a lack of impartiality and/or is colored by personal bias or hyperbole. Others may offer historical generalizations as fact when they actually constitute misinformation. Some may self-censor by purposely not conveying information that might be embarrassing or may present themselves, family members, colleagues, or friends in a poor light.

It is also important to note that individuals can only relate with total accuracy what they have personally witnessed. Thus, by their very nature, first person accounts only provide a slice of life or, put another way, a fraction of what took place during a genocidal event. Likewise, experiences are always dictated by where a person resided as well as when various events took place.

Ultimately, then, researchers and others who make use of first person accounts must keep these factors in mind, crosscheck and corroborate facts when at all possible, and be sure to make distinctions between direct and secondhand evidence.

CONCLUSION

The international crisis in Darfur is entering its eighth year without resolution. Scholars, governments, and others (including officials at the International Criminal Court) continue to debate whether the atrocities perpetrated by GoS troops and the *Janjaweed* constitute crimes against humanity or genocide. The perpetrators continue to hold their positions within the government of Sudan, the GoS military, and the ranks of the *Janjaweed*. In other words, impunity reigns. As for the victims, the “lucky” among the dead lay in shallow graves in Darfur, while the bones of many others are strewn and entangled in mass graves or scattered over the sands of the desert and mountains. As for the survivors, they continue to reside, year after year, in abject conditions in IDP camps within Sudan or in refugee camps in Chad. Tens of thousands of IDPs and refugees have no idea what happened to many of their loved ones—whether they are dead, reside in an IDP camp in Sudan, reside in a refugee camp in Chad, or, if the relatives are girls or young women, serve as concubines for GoS soldiers and/or the *Janjaweed*.

As for the survivors, they hope for the following (and sooner versus later): to return to their land; to see that the perpetrators of the atrocities are held accountable for their malicious and deadly actions; to be accorded basic human rights upon their return to Sudan and to be treated with fairness and equality (self-governance in Darfur versus being subjected to an imposed governance structure, being well represented within the national governance structure, and being provided with a sound infrastructure, meaning enough schools, hospitals, clean water, roads, and bridges in Darfur); and to live in peace.

Until then, they hope they are not forgotten, forsaken, and left to live out their lives as refugees. As one survivor told me:

The worst thing about being a refugee is that you lose value as a human being. Whenever you, as a refugee, ask for your rights, you don’t receive them. Even if your country chases you away, the international community has a responsibility towards you. But when you ask the international community to help you gain these rights—rights it established for everyone—it does nothing to help you. Those people who you approach or travel to the land of [e.g., Chad, where the refugee camps are located], they don’t consider you a human being, they just despise you.

Speaking about losing hope due to the lack of real action by the international community, another survivor commented:

We all wonder if there is no solution. The United Nations, the Security Council, and the Secretary General, they all make resolutions but fail to force the Sudanese government to obey. Some people are shocked by this, when the decisions are continually reversed. It makes people lose hope.

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Abbreviations

AI	Amnesty International
AMIS	African Union Mission in Sudan
AU	African Union
CPA	The Comprehensive Peace Agreement
GoS	Government of Sudan; frequently refugees from Darfur refer to Government of Sudan military troops as “the GoS”
HRW	Human Rights Watch
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
IDPs	Internally displaced persons
JEM	Justice and Equality Movement
NIF	National Islamic Front
MDM	Médecins du Monde
MSF	Médecins Sans Frontières/Doctors Without Borders
NCP	National Congress Party
NGO	Nongovernmental organization
PDF	Popular Defence Force
PHR	Physicians for Human Rights
RPG	Rocket-propelled grenade
SLA	Sudanese Liberation Army [the same as the SLM/A]
SLM/A	Sudan Liberation Movement/Army
SPLM	The Sudan People’s Liberation Movement
UN	United Nations
UNAMID	The African Union-United Nations Hybrid Operation in Darfur
UNHCR	United Nations High Commissioner for Refugees

UNICEF	The United Nations Children’s Fund
UNMIS	United Nations Mission in Sudan
UNPFA	United Nations Population Fund
USAID	U.S. Agency for International Development
WFP	World Food Programme

Glossary

African Union: International organization founded as the Organization of African Unity to promote cooperation among the independent nations of Africa. It often sends missions (including peacekeeping forces) to member states. As a continental organization, it focuses on the promotion of peace, security, and stability on the continent of Africa.

Ali Koship (Actual name: Ali Mohamed Ali. AKA: Ali Kushayb, Ali Kosheib, Ali Kouchib, Ali Kosheb, Ali Koshib, and Ali Koship): High-ranking *Janjaweed* leader. He is a suspected war criminal. He is wanted on over forty counts of crimes against humanity and war crimes by the International Criminal Court (ICC). Among the alleged crimes he is wanted for are inciting mass killing, directing and participating in killings, rape, and forcible displacement of black Africans from their villages. Upon conclusion of its investigation into the crisis in Darfur, the ICC made the decision that there was sufficient evidence to charge Ali Koship with the aforementioned crimes.

Amir: derived from the Arabic word *amara*, which basically means “to command.” It is a title accorded an individual of high nobility (e.g., a prince) or a high political position. The actual position may be any of the following: a chieftain, military commander, high military official, governor of a province, or even head of state in some Islamic countries.

Annan, Kofi: Annan, of Ghana, served as the seventh Secretary-General of the United Nations, from 1997 to 2006.

Antonovs: Government of Sudan planes that carried out attacks on the black African villages in Darfur. Originally, the Antonov was a strategic airlift transport aircraft built by the Antonov Design Bureau, USSR.

The Arab Gathering: a semi-secret group that preaches Arab supremacy and adheres to Islamic extremism, in favor of radically altering the demography of Darfur and ridding it of all African tribes.

In their chapter, "Disaster in Darfur" in their book *Darfur: The Long Road to Disaster*, Burr and Collins (2009) report that "The Arab Gathering was an amorphous collection of Arab movements [whose aim] was to establish a triangular Arab state from Tripoli [Libya], N'djamena [Chad], and Khartoum [Sudan], and to whom Qaddafi [the leader/dictator of Libya] provided military training at the Kufra Oasis" (p. 281). In Darfur, the Arabs received aid from the Government of Sudan and their attacks on the Fur were supported, initially, by then Prime Minister Sadiq al-Mahdi.

al-Bashir, Omar: President of Sudan (1989–present). Assumed office in 1989 following a *coup d'état* that he and his fellow military officers carried out.

The Black Book: Written by the leaders of the Justice and Equality Movement (JEM), *The Black Book* constitutes a grievance against the Government of Sudan for its disenfranchisement of the people of Darfur. It argues that the people of northern Sudan hold disproportionate political power and wealth and purposely marginalize the rest of the country. It was issued in early 2003 and disseminated all over the country.

Boland, Daoud Yahya: Boland, a member of the Fur tribe, was born around 1952 near Nyala, Darfur, into a family that was closely connected with the Mahdist Ansar sect. Ultimately, he was extremely put off by the actions of the main Umma/Ansar leadership, which sought the loyalty of the people of Darfur while taking advantage of them, breaking promises, and providing little to no assistance in the development of Darfur. Eventually, Boland bolted from the Ansar to the Muslim Brotherhood. For years Boland was an active member of and acted on behalf of the Muslim Brotherhood/National Islamic Front, becoming a major figure/leader as a result of his zeal and ability to draw individuals to the movement and to inspire members with his rhetoric and charisma. In the late 1980s, he broke with his colleagues in the Brotherhood when a large group of Arab tribes began attacks against the Fur. Eventually, he became a Sudan People's Liberation Army (SPLA) guerrilla commander. Ultimately, as commander of the SPLA's Darfur division, he was captured by the Sudanese government and imprisoned. He was badly beaten and ended up dying in prison under suspicious circumstances.

Doshkas: trucks with mounted machine guns located in the rear bed.

Fursan: Arabic term for "horsemen." This was a term that preceded the use of "*Janjaweed*."

Garang, John: former leader of the People's Liberation Movement in southern Sudan. Seven months after the signing of the Comprehensive Peace Agreement in January 2005, which brought an end to the twenty-year war between the Sudanese government and the rebels in southern Sudan, he became the first vice president of Sudan, the second most powerful position in the country. In late July 2005, Garang died when the helicopter he was flying in crashed.

GoS: the Government of Sudan, led by President Omar al-Bashir; black African refugees frequently refer to Government of Sudan troops by simply saying "the GoS."

Halim, Abdel Mahmoud Abdel: Sudan's permanent Envoy to the UN.

Haroun, Ahmed: The International Criminal Court (ICC) has issued a warrant for his arrest for allegedly perpetrating crimes against humanity and war crimes.

The ICC prosecutor, Luis Moreno-Ocampo, accused Haroun, in his former position as Sudanese Minister of State, of recruiting and arming *Janjaweed* militias for the express purpose of squelching the black African rebel attacks against the Sudanese government. Moreno-Ocampo asserts that Haroun was “present as arms were distributed to fighters, had full knowledge of atrocities including rape and murder happening on the ground, and incited militias to slaughter civilians in speeches.” Haroun currently serves as governor of the province of South Kordofan, which contains major oil deposits.

Hussein, Abdel Rahim Mohamed: As the Minister of the Interior in 2004, he was accused of supporting the *Janjaweed* and committing war crimes. Both he and the Government of Sudan vehemently deny such charges.

International Criminal Court (ICC): Governed by the Rome Statute, the ICC is the first permanent, treaty-based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community, including crimes against humanity and genocide. The ICC is an independent international organization and is not part of the United Nations system. Its seat is at The Hague in the Netherlands. On July 17, 1998, the international community reached an historic milestone when 120 states adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force on July 1, 2002 after ratification by sixty countries.

Ismail, Mustapha Osman: Current Presidential Advisor to Sudanese President Omar al-Bashir. Previously he served as Foreign Minister of Sudan.

Janjaweed: a colloquial and generic term that refers to a thief or bandit. The term “*Janjaweed*” is said to be a combination of Arabic words referring to an outlaw, a rifle, and a horse. It also has the connotation of “hordes.” Concerning the crisis in Darfur, the term “*Janjaweed*” specifically refers to the Arab militia hired by the Government of Sudan (GoS) to help carry out the scorched earth policy / attacks on the black Africans of Darfur. “*Janjaweed*” is variously interpreted by Westerners as “horsemen with guns,” “mean men with guns on horses or camels,” or “devils on horseback.”

Jesh: a term that some black African refugees use to refer to the soldiers in the Government of Sudan military.

Jihad: a holy war waged by Muslims against infidels or a holy struggle by a Muslim for a spiritual, moral, or political goal.

Justice and Equality Movement (JEM): a rebel group comprising black Africans of Darfur. The JEM espouses an Islamist ideology.

Kalashnikov: an automatic assault rifle. It was first developed in the Soviet Union by Mikhail Kalashnikov in the 1940s.

Khartoum: the capital of Sudan.

Ki-Moon, Ban: On January 1, 2007, Ban Ki-Moon, of the Republic of Korea, became the eighth Secretary-General of the United Nations.

Krourouking: a high-pitched, very eerie sound made by the *Janjaweed* as they carry out attacks on the villages of the black Africans in Darfur.

Médecins Sans Frontières (MSF): an international humanitarian aid organization that provides emergency medical assistance to populations in danger in more than seventy countries. It has been one of the mainstays in Darfur and the various refugee camps in Chad.

Minni Minawi: the military leader of the Sudan Liberation Army (SLA).

Nafi, Ali Nafi: an assistant to Sudanese President Omar al-Bashir and the deputy leader of the ruling National Congress Party. In August 2007, Nafi was assigned the dossier of the Darfur crisis by al-Bashir. Nafi is considered a hardliner in Khartoum and one of al-Bashir's right-hand men.

National Congress Party (NCP): Led by Sudanese President Omar al-Bashir, the NCP is the political party that officially governs Sudan (which it does with an iron hand). The NCP is controlled by a radical ideological and nationalistic group of individuals known collectively as the National Islamic Front (NIF).

National Islamic Front (NIF): founded as a Sudanese political party by the Sudanese Muslim Brotherhood in 1985. Originally known as the Muslim Brotherhood during the 1970s, it favored the implementation of *sharia* law throughout Sudan. The NIF was behind the military overthrow of the democratically elected government of Prime Minister Sadiq al Mahdi in 1989. Following the *coup d'état*, which placed Omar al-Bashir as President of Sudan, the National Islamic Front virtually took control of key facets of Sudanese society, including the media, banking, and construction industries, transportation, and universities. It published a national charter in 1987 calling for the Islamization of the South. It is adamantly against secularism, and, in fact, outright rejects it. It is a party that is wont to using violence and subterfuge to get its way and carries out much of the former through the use of its own militia. In 1991, the NIF pushed through the Criminal Act of 1991, which instituted *sharia* law (harsh punishments such as stoning and amputation) nationwide.

Nimeiri, Jaffar: President of Sudan from 1969 to 1985. He came to power when he and a group of young fellow army officers carried out a *coup d'état*. The coup dispatched a group of civilian rulers who had been in power for five years and had gained a notorious reputation for being corrupt and inept, especially when it came to handling the economy. Nimeiri was a devout Muslim and imposed Islamic *sharia* law in 1983, which many claim was the major catalyst for the twenty-plus-year war between the Government of Sudan and southern Sudan. To throw his rivals off kilter in an ongoing attempt to remain in power, he made a number of radical shifts in policy. Over the years, his style of rule became increasingly authoritarian. He lost his own presidency to a *coup d'état*. After he was overthrown, he was granted political asylum in Egypt. He died on May 30, 2009 at the age of 79.

Sadiq Al-Mahdi, Sadiq: Prime minister of Sudan twice: from July 1966 through May 1967 and from May 1986 to June 1989. In 1989, his administration was overthrown by Omar al-Bashir and a cadre of military officers. al-Bashir subsequently became president of Sudan and remains so to this day.

Salih, Zubair Mohamed: Deputy Chairman of the Junta from 1989 to 1993; Vice President of Sudan from 1993 to 1994; and First Vice President of Sudan from

1994 to 1998. He was killed on February 12, 1998, when a plane carrying military and political leaders crashed in southern Sudan.

Shartay: a rank in some tribal structures in Sudan. Often referred to as the tribal chief. Head of all the sheiks and *umdas*.

Sheik: a traditional leader of a village.

Sudan Liberation Movement/Army (SLM/A): The Sudan Liberation Movement (SLM) was formed in response to the unfair political, economic, and social practices of the Government of Sudan toward black Africans of Darfur and due to the black Africans' frustration at being generally disenfranchised by the government. Ultimately, it became the SLM/A when it formed an army to take on the Government of Sudan. Today, the SLM/A asserts that its goal "is to create a united democratic Sudan on a new basis of equality, complete restructuring and devolution of power, even development, cultural and political pluralism and moral and material prosperity for all Sudanese."

Suq: open air market that is common in many African and Middle Eastern countries.

Taha, Ali Osman Mohammed: a lawyer, Taha has served as Sudan's Second Vice President since August 2005. He held the position of First Vice President between 1998 and August 2005. Prior to becoming First Vice President, he served as Sudan's Foreign Minister for three years. For a number of years in the 1980s, he was a member of Sudan's parliament.

Throughout 2002 to 2004, Taha was personally responsible for handling the Darfur crisis for Sudan. Allegations have been made that Taha was close to Musa Hilal, arranged for Hilal's release from prison, and gave his imprimatur to Hilal to recruit, arm, and lead the *Janjaweed*.

While the ICC prosecutor, Luis Moreno-Ocampo, did not file charges against Taha, the prosecutor's application for a warrant to arrest President Omar al-Bashir on charges of genocide states that Taha "played an important role in implementing Al-Bashir's plan, in particular by assisting in the mobilization of Militia/*Janjaweed*."

Tob: Sudanese law mandates that Sudanese women must wear a particular type of clothing that covers most of the body. A *tob* is the traditional Sudanese dress fashioned out of a fifteen-foot-long piece of material. It is basically wrapped around the body, much like an Indian sari.

Tora Bora: a slur made against the black Africans of Darfur by Government of Sudan soldiers and the *Janjaweed*. It is a reference to the terrorists (Al Qaeda) hiding out in the Tora Bora mountain range in Afghanistan, and is used to suggest that the black African rebels, and actually all black Africans in Darfur, are terrorists.

al-Turabi, Hassan 'Abd Allah: Commonly referred to as Hassan al-Turabi, he is a well-known religious and Islamist political leader in Sudan who has, off and on, held powerful political positions in the Government of Sudan. Due to his politics and opposition to various Sudanese leaders he has spent a great amount of time in prison and under house arrest. He is a strong advocate for an Islamic state and is highly critical of Western secularism. He is believed to be the catalyst for the introduction of sharia law in Sudan. Many also suspect he had, and

possibly continues to have, strong ties to the Justice and Equality (JEM) rebel movement.

UNHCR: Established on December 14, 1950, the United Nations High Commissioner for Refugees works to protect refugees and other displaced people across the globe. It is also involved in helping stateless people in danger of being denied basic rights since they are not a citizen of any country. UNHCR works in over 110 countries.

Umda: a traditional leader, head of all the sheiks in the region/area.

Wadi: a valley, gully, or streambed located in northern Africa and parts of the Middle East that remains dry except during the rainy season, when it often swells with torrents of water.

Wāli: an administrative official.

Historical Overview of the Darfur Genocide

INTRODUCTION

The mass killing of the black Africans of Darfur, Sudan, by Government of Sudan (GoS) troops and the *Janjaweed*¹ (Arab militia) beginning in 2003 constitutes the first acknowledged genocide of the twenty-first century.² Although the process of killing (bombings from airplanes, automatic weapons fire, stabbings, burning people alive, the poisoning of wells, and chasing the victim population into forbidding deserts without water and food) has remained constant over the years, the amount of killing has risen and fallen, ebbed and flowed as the GoS has turned the spigot of violence on and off according to its wiles in its game of brinkmanship with the international community. To date, it is estimated that between 300,000 and 400,000 people have been killed as a result of genocide and/or perished due to “genocide by attrition” (via starvation, dehydration, and unattended injuries).³

¹ Colloquially, according to the black Africans of Darfur, *Janjaweed* means, variously, “hordes,” “ruffians,” and “men or devils on horseback.”

² The phrase “the first acknowledged genocide” is used here, for it is certainly possible that other genocides were and are being perpetrated in the early part of the twenty-first century but have not yet been detected by the international community. In fact, various scholars and political pundits have suggested that genocide could be underway in such varied places as the Democratic Republic of the Congo, and in far-flung areas where indigenous groups reside.

³ On March 29, 2008, the former UN Undersecretary-General for Humanitarian Affairs, Jan Egeland, stated that he believed that tens of thousands more people may have died in Darfur since his first estimate in 2006 that some 200,000 people had died as a result of the crisis. He asserted that 400,000 was probably closer to the true number of dead. “You have the figure 200,000 people died in Darfur which has been used continuously since I gave it,” Egeland said. “Please stop using that figure. I gave it. It’s 2 1/2 years old. It’s wrong” (quoted in Associated Press 2008, n.p.). On April 23, 2008, John Holmes, the UN head of humanitarian affairs, informed the UN Security Council that the number of deaths as a result of the Darfur crisis “could be 300,000” (quoted in UN News Centre 2008, n.p.). That is a 50 percent increase over the last number (200,000) cited by his agency in 2006, which came from a 2006

Darfur, a region in west Sudan, comprises three states (Northern Darfur, Western Darfur, and Southern Darfur). The three-state region is roughly the size of France (or, put another way, Texas), and shares borders with Libya, Chad, and the Central African Republic. The vast majority of the people of Darfur, both the so-called “black Africans” and the Arabs, are Muslim.

Darfur is one of the most underdeveloped and isolated regions of Sudan, the latter of which constitutes one of the twenty-five poorest countries in the world. More specifically, more than 90 percent of Sudan’s citizens live below the poverty line, barely eking out an existence.

While much of the Darfur region consists of large swaths of burning desert (except during the rainy season, when *wadis* swell with water), it also has lush grasslands where herds graze and areas where crops are cultivated. The most productive land was largely occupied by sedentary farmers and cattle owners who tended to be non-Arabs. Until fairly recently, at certain times of the year, the pasture land was used as a result of mutual agreement between the sedentary black Africans and semi-nomadic and nomadic Arab groups. This resulted in a symbiotic relationship of sorts; that is, while the Arabs’ animals were allowed to feed and drink water the herds fertilized the ground owned by the black Africans, thus renewing the soil for subsequent growing seasons.

When conflicts erupted in the not-too-distant past among individuals and/or groups (be it among individuals in the same village, different black African tribal groups, or between black Africans and Arabs), the disagreements were generally resolved by the intervention and mediation of local leaders (*umdas* or sheiks). While neither conflict nor violence was uncommon, it rarely resulted in wholesale violence that went on for months, let alone years. When called for, some sort of “blood money” was paid to the victim, be it for kin killed, animals stolen, or some other transgression. The handing over of the blood money by the “guilty party” to the “victim” generally settled the grievance, and life went on as usual.

Notably, there was a certain amount of intermarriage amongst and between the various peoples of Darfur, including non-Arabs and Arabs. Thus, different groups of people cohabited as neighbors, friends, and even relatives—not as sworn enemies due to ethnic, racial, or any other type of classification/category.

study conducted by the World Health Organization. Both numbers included individuals who were killed as a result of the fighting as well as those who perished from malnutrition, dehydration, and disease because of the conflict. The 2006 estimate “must be much higher now—perhaps as much as half again,” Holmes said. Sudan continues to hotly dispute such large numbers, asserting that only 10,000 have died as a result of the fighting.

WHO IS COMMITTING THIS GENOCIDE?

Both Government of Sudan (GoS) troops and the *Janjaweed* are the actors who have carried out the actual killings, mass and gang rapes, and the wholesale destruction of black African villages. Ample evidence indicates that the vast majority of attacks against black African villages from 2003 forward have been undertaken, in tandem, by GoS troops and the *Janjaweed*. In most cases, the attacks have involved bombings by GoS aircraft, followed by a ground attack involving hundreds of *Janjaweed* on camels and horses and both GoS troops and *Janjaweed* in four-wheel vehicles (some mounted with machine guns).

The *Janjaweed* comprises semi-nomadic and nomadic Arab herders. Many have previously fought in one or more wars in the region, a good number serving as mercenaries. Many Arab herders were forced—upon the threat of their own death and harm to their families—to join in attacks against black Africans. It is also significant to note and recognize that many Arabs have not been involved in the attacks, are not members of the *Janjaweed*, and do not necessarily support—and may, in fact, look askance at—the actions of the GoS and the *Janjaweed*. In this regard, Flint (2004) argues that

[i]t cannot be stated too often that the majority of Arab tribes in Darfur have refused to join the government war in Darfur, despite blandishments, threats and inducements that range from sacks filled with cash to cars to development programs and homes in the capital, Khartoum.

In Darfur, the Rizeigat, Beni Halba, Habbaniya, Taaisha, Mahariya, Beni Hussein, Misseriya, and Maaliya tribes, to name only some of Darfur's Arab tribes, have all chosen either to cast their lot in with their African neighbors or to endeavour to remain neutral (p. 1).

The Sudanese government readily admits that its troops responded to attacks on government facilities (including military bases) by black African rebels, but it has claimed, time and again, that the *Janjaweed* is largely responsible for the subsequent and sustained scorched earth attacks against all black Africans. The GoS has further argued that the *Janjaweed* are loose cannons and that the government does not have the means to rein them in. Such assertions are disingenuous at best, for ample evidence exists that the vast majority of the attacks on black African villages have been carried out by both GoS troops and the *Janjaweed* (Human Rights Watch 2004a; Physicians for Human Rights 2005; U.S. State Department 2004).

There is also evidence that the GoS hired the *Janjaweed* to join GoS troops in carrying out attacks against black Africans. The GoS did so for two main reasons: first, because GoS military troops were already overstretched in a war against rebel troops in southern Sudan and thus did not have enough soldiers

available to address the crisis in Darfur (Human Rights Watch 2004b)⁴; and second, many soldiers in the GoS military were black African, and thus the GoS didn't trust them to carry out attacks on their own people's villages.

WHO ARE THE VICTIMS?

As previously mentioned, the victims of genocide in Darfur are various black African tribal groups. The main groups that have been attacked are the Fur, Massaleit, and Zaghawa. That said, like many, if not most, of the issues surrounding the Darfur crisis, the composition of the Darfur population is a complex one. Indeed, although "African" and "Arab" are common terms used in describing and, at least in part, explaining the conflict, neither term does justice to either the diversity of ethnic groups that make up Darfur or "the nuanced relationships among ethnic groups" (Human Rights Watch 2004a, p. 1 of "The Background").

Many experts, in fact, assert there is virtually no difference between the so-called black Africans of Darfur and the Arab population (Mamdani quoted in Sengupta 2004, p. 1; de Waal 2004a; de Waal 2004c). Mamdani (2004), for example, asserts that "... all parties involved in the Darfur conflict—whether they are referred to as 'Arab' or as 'African'—are equally indigenous and equally black" (p. 2). He has also stated that "from the cultural point of view, one can be both African and Arab" (Mamdani 2004, p. 2). Such individuals assert that all the people are black (and not necessarily "light," as the Arabs are sometimes purported to be), and that since all live in Africa, they are all African. In this regard, Alex de Waal (2004a),

⁴ Civil war broke out between the GoS and rebel groups in southern Sudan in 1983 and ended in 2005. It is estimated that some two million people were killed during that twenty-two-year period and another four million people were displaced. In fact, over the course of the war, at one time or another, about 80 percent of southern Sudan's people experienced displacement. The war began, in part, when the GoS implemented Islamic Sharia law throughout the country. Both Christian and animist peoples residing in the south were adamantly against such a law, and made their disenchantment known. The people in the south had many of the same complaints that the people of Darfur have expressed, especially in the realm of political, economic and social disenfranchisement. Ultimately, the GoS and rebel groups from the south (comprising individuals from Christian and animist groups) engaged in the lengthy and deadly fight—the rebels to wrest the south from the GoS in the north and the GoS to regain control of the south and to banish the Christians and animists from their homes and land. As one journalist put it, "[w]hen government planes are not bombing [the] homes, churches, and schools [of the people in the south in the areas controlled by the Sudan Peoples Liberation Army], armed Arab militias on horseback spread terror throughout the villages, killing men, raping women and taking away their domestic animals. The conflict in Sudan is one in which all known rules of war have constantly been violated" (Achieng 2000, 1). A December 1998 report issued by the United States Committee for Refugees asserted that "Sudan's civil war has been characterized by an incremental ferocity that has left untouched practically no one in southern Sudan. . . . The government has systematically blocked food supplies to the south, attacked villages and driven large groups of people to areas where they could not survive. . . . It's a very deliberate strategy on the part of the government of Sudan to depopulate large parts of southern Sudan" (quoted in BBC News 1998, 1, 2).

an expert on Sudan, has asserted that “characterizing the Darfur war as ‘Arabs’ versus ‘Africans’ obscures the reality. Darfur’s Arabs are black, indigenous, African Muslims—just like Darfur’s non Arabs, who hail from the Fur, Masalit, Zaghawa and a dozen smaller tribes” (p. 1). More specifically, de Waal (2004b) asserts that

[t]he Zaghawa . . . are certainly indigenous, black and African: they share distant origins with the Berbers of Morocco and other ancient Saharan peoples. But the name of the “Bedeyat,” the Zaghawa’s close kin, should alert us to their true origins: pluralize in the more traditional manner and we have “bedeyiin” or Bedouins. Similarly, the Zaghawa’s adversaries in this war, the Darfurian Arabs, are “Arabs.” In the ancient sense of “Bedouin,” meaning desert nomad . . . , Darfurian Arabs, too, are indigenous, black and African. In fact there are no discernible racial or religious differences between the two: all have lived there for centuries (n.p.).

Many also assert that since there has been so much intermarriage among scores of various groups in the three-state region of Darfur, it is almost impossible to definitively state whether a person is from one tribe (or ethnic group) or another. Some also assert that “where the vast majority of people [in Darfur] are Muslim and Arabic-speaking, the distinction between ‘Arab’ and ‘African’ is more cultural than racial” (UN Office for the Coordination of Humanitarian Affairs 2003; IRIN 2007, p. 2). Mamdani has asserted that “the real roots of combat are not racial or ethnic but political and economic” (quoted in Hill 2006). Some have also noted that certain “black Africans” who have, over time, attained a certain amount of wealth have purportedly chosen to become “Arab.”

That said, it is a fact that both the perpetrators and the victims themselves *make a distinction between* those who are purportedly “Arab” and those who are purportedly “black African.” One major report after another (Human Rights Watch 2004a; Physicians for Human Rights 2005; U.S. State Department 2004) contains information about how the very people involved in the crisis make such distinctions. For example, in its report *Darfur Destroyed*, Human Rights Watch (2004a) reports that “[e]specially since the beginning of the conflict in 2003, members of the Zaghawa, Fur, and Massaleit communities have used these terms [black Africans and Arabs] to describe the growing racial and ethnic polarization in Darfur, perceived to result from discrimination and bias emanating from the central government” (“The Background,” p. 1).

Furthermore, the vast majority of first person testimony collected by investigatory teams, human rights groups, and scholars notes that the *Janjaweed* frequently scream racial epithets at their black African victims. (Readers of the interviews in this book will encounter many such instances.) More specifically, both black African internally displaced persons (IDPs) and refugees have commented that the *Janjaweed* (and, for that matter, GoS soldiers) spewed the following at them: “You are not a

real Sudanese, you're black. . . . We are the real Sudanese. No blacks need stay here"; "We are going to cut off your roots"; "The President of Sudan ordered us to cleanse Darfur of the dirty slaves so we can have the beginning of the Arab Union" (quoted in Totten and Markusen 2006, p. 98). Emily Wax (2004), a *Washington Post* correspondent in Africa, reported that as a twenty-two-year-old black African woman was about to be raped by six *Janjaweed*, they spat out: "Black girl, you are too dark. You are like a dog. We want to make a light baby" (p. 1). Wax (2004) also reported that another young woman who was raped by militiamen was told, "Dog, you have sex with me. . . . The government gave me permission to rape you. This is not your land anymore, abid [slave], go" (p. 2).

WHY WAS THIS GENOCIDE COMMITTED?

The causes of any case of genocide are extremely complex, and the Darfur genocide is no exception. An act of genocide never results from a single factor; indeed, genocide results from a synergy of trends, issues, and events that influence the thinking and actions of potential perpetrators who ultimately intend to extirpate, in one way or another, those it perceives as enemies, dangerous, and/or in some way loathsome (and thus "outside their universe of obligation"). In the case of Darfur, the issues/events that combined to make genocide possible were as follows:

- extreme drought and desertification;
- Arab supremacism;
- authoritarianism;
- the disenfranchisement of black Africans at the hands of the Sudanese government; and
- an ever-increasing bellicosity in the region (within Sudan, Darfur, and beyond its borders).

Extreme Drought and Desertification

Since the early 1970s, numerous droughts (including the "great drought" of 1984–1985) resulted in ever-increasing desertification within the Darfur region. Reportedly, and tellingly, a severe drought in the 1970s resulted in sections of the Sahara Desert creeping southward by as much as 60 miles.

Accompanied by fierce sandstorms, the desertification of the land in Darfur resulted in a dramatic decline in the yield of produce, loss of pastureland, and a loss of livestock. Along with famine (some instances caused by nature, some by man—and some lasting much longer than those of the past), the impact of the drought increased tensions over land use and access to water and ultimately resulted in ever-increasing conflict and violence between the nomadic/semi-nomadic Arab groups and

the sedentary/farming group of non-Arabs. Exacerbating this situation was the fact that drought affected other countries in the region as well, and nomads from Chad and Libya migrated to Darfur in extremely large numbers in search of grazing land, putting further pressure on the scant resources available.

Not only did nature force nomadic groups to sweep lower south to locate sustenance for their herds, it also resulted in their herds grazing on parcels of land for longer than usual. At the same time, farmers became increasingly protective of their land. Some even resorted to erecting fences and establishing fees for land and water usage. What constituted protective efforts by the sedentary peoples/farmers were perceived by the nomads as being stingy, unfair, and detrimental to the welfare of their families and animals.

It is imperative to understand that neither drought nor desertification, alone or in tandem, was *the* cause for the violence. While both certainly played an instrumental part in the events leading up to the ensuing violence, *politics was at the heart of the matter*.

Arab Supremacism

Arab supremacism is an ideology that preaches, promotes, and sustains—in certain situations, at all cost—the notion that Arab beliefs and way of life are superior to all others. Essentially, it calls for Arab dominance in all aspects of life—culturally, politically, economically, judicially, and socially. Ultimately, it is an ideology that perceives all those who are not Arab as inferior. In Sudan, this has led to both the demonization and disenfranchisement of certain groups. The origins of Arab supremacism “lay in the Libya of Colonel Gaddafi in the 1970s” and “the politics of the Sahara” (Flint and de Waal 2005, p. 50). Gaddafi, in fact, fantasized about establishing an “Arab belt” across Africa. To accomplish this goal, he created, with his oil riches, various mechanisms, including “the *Faliq al Islamiyya* (Islamic Legion), which recruited Bedouins from Mauritania to Sudan; the *Munazamat Da’awa al Islamiyya* (Organization of the Islamic Call), which fostered Islamic philanthropy and evangelization; and the sponsorship of the Sudanese opposition National Front, including the Muslim Brothers (or Muslim Brotherhood) and the *Ansar* (the *umma’s* military wing).

Any mention of Arab supremacism and Sudan is incomplete if it neglects to comment on the role of Hassan Abd al Turabi, an Islamist, a former law professor at the University of Khartoum, and a government official under Sudanese presidents Jaafar Nimeiri and Omar al-Bashir. Turabi was for decades a major figure in the Muslim Brotherhood (which originated in Egypt) and had been active in Sudan since 1949. The Brotherhood’s primary goal in Sudan was to “institutionalize Islamic law” (Mertz 1991). In 1964, the year the Brotherhood established its first political party,

Turabi became Secretary General of the Muslim Brotherhood. Turabi was also closely involved with the Islamic Charter Front, which proposed that Sudan adopt an Islamic Constitution. The latter established that those Sudanese who were not Muslim would be considered and treated as second-class citizens.

Over time, the Brotherhood established a close relationship with young Darfurians, convincing the latter that the Brotherhood's headlong push for the establishment of Islamic law was positive and that, as an organization, it was bereft of the prejudice and discrimination that was so rife within the Sudanese government when it came to ethnic and tribal differences. Believing such assertions, the young Darfurians put their trust in Turabi and then threw their support behind him.

Beginning as a peaceful civilian movement, the Brotherhood gradually morphed into a powerful and radical rebel group. More specifically, following a *coup d'état* in 1969 in which Colonel Jaafar Nimeiri became prime minister of Sudan, Turabi's Islamist Party was dissolved. Immediately, the Islamists began planning their own rebellion, which was quashed by the Sudanese military in March 1970. The combined effort of the Sudanese air force and ground troops resulted in the deaths of hundreds of Islamists fighters. Many survivors sought exile in Libya, where they established military-like camps in preparation for a later attempt to dislodge the Nimeiri (who eventually became president) government. As Flint and de Waal (2005) note, "[t]heir [the Islamists'] plan [while undergoing training] was an armed invasion of Sudan from bases in Libya, crossing Darfur and Kordofan to storm the capital. [Ultimately,] in July 1976, the Ansar-Islamist alliance very nearly succeeded . . . but the army counterattacked and the rebels were defeated" (pp. 22–23).

Turabi, a master at Machiavellian politics, found a way to disassociate himself from the failed invasion and ingratiate himself with Nimeiri. In fact, Turabi became so close to Nimeiri that he became his attorney general in 1977. At the same time, in his quest to establish an Islamic state, "[Turabi] infiltrated Islamist cadres into the armed forces, including elite units such as the air force" (Flint and de Waal 2005, p. 23). Always intent on imposing his Islamist vision on Sudan, Turabi led the way in implementing *sharia* (Islamic law) in Sudan in 1983. The imposition of *sharia* resulted in a slew of amputations and hangings. Due to a combination of disgust and fear at the brutality meted out by the government as a result of its *sharia*-induced legislation, Nimeiri was overthrown in 1985. Parliamentary rule was subsequently reinstated, but Turabi almost immediately helped to establish the National Islamic Front (NIF), a political party controlled by the Muslim Brotherhood.

Only for a short while did Sudan return to parliamentary rule. In 1989, with Turabi in the shadows but playing an integral role as a power broker, a military coup overthrew the elected government. Subsequently, Omar al-Bashir was installed as president of Sudan. As Sudan entered a period

of increased turbulence, Turabi is said to have served as the real power behind the scenes.

In the early 1990s, the Sudanese Islamists began to inculcate Islamist thought throughout Sudan. At the forefront of the effort were Turabi and Ali Osman Mohamed Taha, the latter an ardent Islamist and an on-again, off-again government figure. As part and parcel of this effort, Turabi established the Popular Arab Islamic Conference (PAIC), basically a regional organization for political Islamist militants, in 1990. In his position as secretary general of PAIC, Turabi induced the Sudan government to create “an open door policy for Arabs, including Turabi’s Islamist associate Osama bin Laden, who made his base in Sudan in 1990–1996” (Human Rights Watch 2002, p. 1). In order to accomplish their goals, “Islamist cadres were dispatched to foment a new Islamist consciousness in every village. Islamist philanthropic agencies were mobilized to open schools and clinics, and to support the Popular Defence Forces [PDF]. A raft of programmes aimed at building an Islamic Republic was launched” (Flint and de Waal 2005, p. 28). Ultimately, though, Turabi concluded that if he was to succeed in gaining power through the elective process, he needed to part ways with the Brotherhood. This was primarily true because the Brotherhood perceived Islamism and Arabism as one and the same. Since many of those residing in Darfur were not Arab, and since Turabi believed he needed the votes of those in the West who were not Arab, he shrewdly cut his ties with the Brotherhood.

In 1999, Turabi set out to become the major power in Sudan. Once again, however, his grand plans came to naught. Not only did Ali Osman break with Turabi as a result of looking askance at Turabi’s ploys, schemes, and intrigues, but al-Bashir—not about to be pushed aside—announced a state of emergency and removed Turabi from office (thus wiping out Turabi’s powerbase within the government). The ramifications were immense for Darfur: “[t]he Bashir-Turabi split lost Darfur for the government, but made it possible to make peace in the South” (Flint and de Waal 2005, p. 41).

Authoritarianism

For more than twenty years (1989–present), Sudan has been under the authoritarian rule of Omar al-Bashir. His government controls virtually every aspect of Sudanese life. And, when Turabi was a power behind the scenes, it meant that the Islamists were like puppeteers, largely directing all aspects of Sudanese life. Those living in what is commonly referred to as the “peripheries” in Sudan (that is, those areas far from Khartoum, the “center” or powerbase in Sudan), were (and are) perceived and treated as second-class citizens.

As soon as the new al-Bashir government, with its Islamist focus, took power in 1989, it began dictating what was and was not acceptable in the

way of behavior, dress, speech, and assembly (or association) with others. Furthermore, individuals were arrested for any and all dissent, people “disappeared” into secret prisons, torture was meted out regularly and viciously, and the judicial system answered only to al-Bashir and his cronies.

Disenfranchisement

Darfur is not only one of the poorest regions in Sudan but one of the poorest regions in all of Africa. A single region of Sudan, the North (where Khartoum, the capital, is located), comprises just over five percent of the country’s population but controls virtually all of Sudan. Put another way, it controls the nation’s wealth and it controls the nation’s politics. Almost all of those who hold major posts within the country have come from the North. Indeed, every president and prime minister has come from the North, along with the vast majority of those who have headed up important positions dealing with the development, infrastructure, and economy of the country. For years on end, the black Africans of Darfur have requested the establishment of more schools and medical facilities—all of which are minimal in number and sorely underfunded—and have repeatedly requested more roads and bridges, which remain largely nonexistent in Darfur. Most, if not all, of the black Africans’ requests for assistance and their fair share largely fell on deaf ears in Khartoum.

For many years, black Africans of Darfur decried the hegemony of the North, as well as the fact that they (those residing in the West) have suffered prejudice, discrimination, and disenfranchisement. Numerous examples of such disenfranchisement could be cited, but three shall suffice. First, “infant mortality in the West (at 122.5 boys and 104.2 girls dying per 1000 births) is strikingly different from infant mortality in the North (100.1 boys and 88.8 girls per thousand births)” (Cobham 2005). This difference is undoubtedly due in large part to the availability of adequate medical facilities and qualified medical personnel in the North, but not in the West. According to *The Black Book*, a document written, published, and disseminated by the Justice and Equality Movement (JEM—a black African rebel group) (2000) that delineated the facts of disenfranchisement in Darfur, “[t]he entire State of Western Darfur has two medical specialists in the field of obstetrics and gynecology, one in Geneina and the other in Zalengay. They are to serve a population of 1,650,000 aided by [a] few medical students who visit the area for training and for escaping mandatory military service” (p. 53). Second, “water development is currently reserved for the ever-expanding capital Khartoum. The rest of the country is left out, dying of thirst as well as diseases like malaria, kalazar, bilharsiasis, and other water-borne diseases” (Justice and Equality Movement 2000, p. 41). Third, the development of the

country (the construction of roads, bridges, water systems, hospitals, and schools) is largely limited to the North. Even those other areas that have seen development largely benefit those who are from the North. As for the West, "the entire Western region now lacks a single developmental scheme which could support one province for a single week" (Justice and Equality Movement 2000, p. 5).

In May 2000, *The Black Book* (whose complete title is *The Black Book: Imbalance of Power and Wealth in Sudan*) mysteriously appeared in Khartoum. Copies were handed out outside major mosques following Friday prayers. Many are even said to have been placed brazenly on the desks of key Sudanese officials, including that of President al-Bashir. As photocopies of the book were "spontaneously" produced, *The Black Book* began to appear both throughout the country and abroad. Tellingly, *The Black Book* was dedicated in part to "... the Sudanese people who have endured oppression, injustice and tyranny."

The Black Book argues that ever since Sudan's independence, those who control the political and economic power within the Sudanese government (variously referred to as "the elite" or "the ruling elite") and, by extension, the entire country, are from northern Sudan. More specifically, it asserts that the vast majority of posts in the government, the judiciary, the military, and the police all come from the North (and primarily from three tribal groups, the Shaygiyya, Ja'aliyyin, and Danagla) and/or are appointed by the "centre," the ruling elite. It also states that the "peripheries" of the country (those in the West, South, and East) have been purposely denied fair representation in the government and have been forced to lead a life of impoverishment. The authors' introduction asserts that at the turn of the millennium, Sudan remained "steeped in poverty, illiteracy, disease and lack of development" (Justice and Equality Movement 2000, p. 1).

de Waal (2004b) argues that *The Black Book* essentially "condemned the Islamist promise to Darfur as a sham. The *Black Book* was a key step in the polarization of the country along politically constructed 'racial' rather than religious lines, and it laid the basis for a coalition between Darfur's radicals, who formed the SLA, and its Islamists, who formed the other rebel organization, the Justice and Equality Movement" (p. 8). *The Black Book* may have constituted a key step in the polarization of the country along politically constructed "racial" lines, but it was hardly the first or the major step. In light of the ongoing attacks since the early 1990s by various Arab groups (nomads, semi-nomads, and then, collaboratively, by Arab herders and GoS troops) against black African villages, it seems obvious that the "racial divide" was certainly evident, and being acted upon, many years prior to the appearance of *The Black Book*. In that regard, it seems *The Black Book* was more the messenger versus the instigator of the polarization along "racial lines."

Ever-increasing Insecurity and Bellicosity in the Darfur Region

Beginning in the late 1980s, Arab herders began carrying out attacks against entire villages of sedentary black African farmers. Over time, such attacks began to involve both GoS troops and the Arab herders working in tandem. While vicious, such attacks were certainly not as systematic as the scorched earth attacks that became increasingly common in 2003 and beyond. The initial increase in violent conflict within the region was due to a host of issues. For example, in the 1980s, the GoS, under President Nimeiri, abruptly replaced the tribal councils, the traditional bodies that helped solve conflicts, with government oversight of the region. Nimeiri, however, failed to provide adequate resources to the regional government offices; as a result, the offices and the services they were to provide largely became hollow shells

Making matters even more volatile, since Arabs held the vast majority of positions in the government (including those of police and court officials), the black Africans of Darfur were automatically at a distinct disadvantage. Disputes that were once dealt with fairly and equitably (for the most part) by traditional and/or governmental authorities were now handled by officials partial to the Arab sector of the population.

Furthermore, as certain groups of nomads increasingly bought into the beliefs of Arab supremacism, they began to act as if they were indeed superior to the black Africans.⁵ Along with the huge influx of weapons into Darfur (in part because of the various wars in the region, three of which were the Libya/Chad conflict, the prolonged war in southern Sudan, and the Eritrean separatist war with Ethiopia [1961–1993]), more and more herders began carrying weapons. This was likely done for protection, but also because they had fought in one or more of the violent conflicts in the region and thus became accustomed to carrying them. Ultimately, the GoS also provided such groups with weapons with the expectation that the Arab herders would, in various cases, serve as their proxies in dealing with the black Africans. As the Arab herders increasingly engaged in conflicts with the black Africans over land and water use, they (the Arabs) made it known that they were ready and willing to use their weapons. Thus, with the difficulties presented by the droughts and desertification of pasture land, the influence of Arab supremacism, and the Arab herders' experiences as mercenaries, it is not surprising that many of the Arab nomadic groups became increasingly cavalier and aggressive in their use of the sedentary people's lands in the early to mid-1990s.

Not only did the Arab nomads purposely not seek permission to use the land, but they refused to apologize for trespassing when confronted by the

⁵ Again, Arab nomads (individuals and groups) were, and are, not of a single mind, and thus should not be painted as a monolithic group or movement.

black African farmers. When confronted, it was not uncommon for the nomads to threaten the farmers' lives. In many cases, they carried out their threats.

Out of fear and anger over the constant assaults and attacks on their villages and a lack of protection from local and regional governmental authorities, along with the gradual realization that the Arab marauders had tacit approval from local government officials to do as they wished, the black Africans began to form self-defense groups "on a tribal basis as opposed to based on local communities" (Fadul and Tanner 2007, 301).⁶

THE INITIAL REBEL ATTACKS AND THE RESPONSE BY THE GOVERNMENT OF SUDAN

By the early 1990s, traditional dispute resolution approaches were proving inadequate. Arab nomadic attacks against black Africans were becoming more frequent, more vicious, and more costly in terms of lost lives and destroyed villages, farmland, and orchards. In August 1995, for example, Arab raiders attacked and burned the non-Arab village of Mejmeri in West Darfur, stealing 40,000 cattle and massacring twenty-three civilians. By late 1998, more than 100,000 non-Arab Massaleit had fled to Chad to escape the violent attacks (Flint and de Waal 2005, p. 69).

A great many of the attacks on villages were not one-time affairs. In fact, in the early to late 1990s, some villages were attacked up to four and more times. In certain cases, African villages were partially burned by the marauders; in others, villages were utterly destroyed. Almost always, the villages were pillaged and then the black Africans' herds were stolen.

⁶ Regarding the establishment of the self-defense groups by non-Arabs in Darfur, Fadul and Tanner (2007) comment as follows:

From the 1980s onwards, in Darfur and elsewhere, successive governments in Khartoum mobilized and armed Arab groups to do their bidding, mostly to attack and subdue populations considered hostile. The NIF (National Islamic Front) government furthered the tribal militia policy with the passage of the Popular Defense Act of 1989, making the PDF official. The government entrenched the policy in local government by elevating Arab traditional administrators above non-Arabs in the native Administration. . . . The Arab groups of western Sudan, Darfur, and Kordofan have been militarized for over two decades. By contrast, non-Arab communities mobilized along far more local lines, resorting to community-level strategies to try to ensure their protection. One such response was the establishment of self-defense committees. In the late 1980s and early 1990s, as Arab violence against non-Arab communities mounted, especially in western Darfur, and the state did not intervene, some of these communities started arming themselves. . . . These groups were poorly equipped and ill-coordinated, despite isolated attempts in the late 1980s and early 1990s to organize themselves. . . . They sold government sugar rations and livestock, and bought light weapons and ammunition from the Chadian military on the border.

. . . The important point here is that the locus of these groups was the village and its outlying homesteads. There was little if any tactical cooperation among the self-defense groups; if Arab militias attacked one village, the self-defense force in the next village would most often just stay put until it in turn was attacked (p. 302).

Black Africans were often forced out of their villages only to be chased down in the desert and beaten and/or killed.

Desiring to remain on their land, the black Africans more often than not returned to their villages once the marauders had left, rebuilt those sections destroyed, and carried on with life. However, as these attacks continued unabated, the black Africans began to look askance at the government. In light of the way the black Africans were being treated (a frustrating combination of being ignored and/or treated poorly by the government), it is not surprising that the following statement/critique of the Sudanese government made it into *The Black Book*:

Conditions for accepting the authority of the ruler/ governing power: The authority must demonstrate its commitment to maintain sovereignty of land against foreign intruders; treat its citizens equally; afford them peace and protection; guarantee dignified life; spread freedom and dignity, and must enable its citizens to fully participate in conducting their public affairs. All that is to take place within an environment that is conducive for participation of all without religious, ethnic, skin colour and gender discrimination.

The state authority cannot implement that without commitment to its national laws that regulate and divide powers among different state organs. Most important here is the separation between state powers, and in particular the political, the judicial and the legislative (Justice and Equality Movement 2000, p. 6).

In 2001 and 2002, before the current conflict became widely known to the outside world, a rebel movement comprising non-Arabs in Darfur emerged. The first rebel group to appear called itself the Sudanese Liberation Movement/Army (SLM/A), and on March 14, 2003, it issued the following political declaration: "The brutal oppression, ethnic cleansing and genocide sponsored by the Khartoum government left the people of Darfur with no other option but to resort to popular political and military resistance for purposes of survival. This popular resistance has now coalesced into a political movement known as the Sudan Liberation Movement and its military wing, the Sudan Liberation Army (SLM/SLA)" (The Sudan Liberation Movement and Sudan Liberation Army 2003, pp. 1–2). Within a relatively short period of time, a second rebel group emerged, calling itself the Justice and Equality Movement (JEM). According to Flint and de Waal (2005), within JEM there are "two main tendencies that dwarf all others: one is tribal, the other Islamic" (p. 89).

In addition to providing local security for the black African villagers of Darfur, the two rebel groups issued protests against the economic and political marginalization of Darfur. The aforementioned *Black Book* was one such protest; indeed, it constituted the most detailed critique of the government to date, as well as a protest that reached the greatest and most diverse audience (from the top officials of the country all the way to the illiterate population who learned about the contents of *The Black Book* as a result of having it read to them). Members of both rebel groups came primarily (but by no means

exclusively) from three non-Arab tribes—the Fur, Massaleit, and Zaghawa—that had been attacked for years by nomadic Arab groups and GoS troops.

By late 2003, a flood of black Africans had either been forced from their homes as a result of GoS and *Janjaweed* attacks or had left out of sheer fear. By September 2003, the United Nations (UN) reported that some 65,000 refugees from Darfur had fled to Chad.⁷ By December 9, 2003, the UN estimated that there were up to 600,000 internally displaced people (IDP) in Darfur as a result of the attacks on the black Africans' villages. In November 2004, *Médecins Sans Frontières* (Doctors Without Borders) estimated that some 1.8 million Darfurians had been displaced from their homes, with 200,000 of them in refugee camps in Chad (and the rest in internally displaced persons camps in Darfur) (*Médecins Sans Frontières* 2004, p. 1).

At the same time, the leaders of both rebel groups seemingly followed the ongoing and drawn-out peace negotiations between the GoS and the rebel groups in southern Sudan and, in doing so, realized that armed insurrection in the south might evenuate in important concessions by the GoS, including power-sharing and access to major economic resources. Whether such knowledge was the catalyst or trigger for the initial rebel attacks against the government, only the leaders of SLM/A know for sure.

Popular account has it that the GoS, alarmed by the rebel attacks and with its own military forces stretched thin by the north-south civil war, decided to recruit, train, and equip Arab militias (the so-called *Janjaweed*) to help suppress what it perceived as a black African rebellion in Darfur.⁸ Any government whose military bases and/or other

⁷ As early as February 3, 1997, the UN Special Rapporteur on the Situation of Human Rights in Sudan, Gaspar Biro, warned of serious intertribal clashes in West Darfur between the Rizeighat, Missirya, and other Arab nomadic tribes and the Zaghawa and Massaleit (so-called black African) tribes. Furthermore, in October 2006, the London-based Minority Rights Group International issued a report that asserted that United Nations authorities were warned of ethnic tensions in Darfur as early as 2001 but chose to ignore the facts: "As early as 2001, the UN Commission on Human Rights' Special Rapporteur for Human Rights in Sudan began paying particular attention to Darfur, visiting the region in early 2002. His August 2002 report highlighted the violence in Darfur and noted Masalit claims that 'the depopulation of villages, displacement and changes in land ownership are allegedly part of a government strategy to alter the demography of the region.' Despite his concerns, the 2003 Commission on Human Rights removed Sudan from its watch-list and ended the mandate of the Special Rapporteur" (Srinivasan 2006, p. 6). Many argue that the international community was so intent on bringing the twenty-year Sudanese civil war in the south to a close that it believed any attention directed at Darfur might result in "a peace spoiler."

⁸ In interviews with black African Darfuran refugees in Gaga and Farchana refugee camps in eastern Chad during the summer of 2007 and in a refugee camp in the Nuba Mountains during the summer of 2010, this author was told that Arab nomads had been provided with weapons and trained by the GoS as early as the mid-1990s. Furthermore, it has been reported that as early as the late 1980s, the so-called *Janjaweed* had been used by the Sudanese leadership to supplement government troops in the fight against southern rebels (Prunier 2005, p. 97). It is certainly possible, if not highly probable, that many of them had roamed throughout Darfur and eventually joined nomadic groups as the latter herded livestock.

government facilities are attacked will attempt to suppress future attacks. Governments will either arrest the perpetrators or, if the situation degenerates into more violence, shoot and then apprehend them or kill them outright. What the GoS did, however, was something vastly different and, ultimately, criminal. Using the argument that it believed black African villagers were harboring rebels, the GoS (along with the *Janjaweed*) began attacking village after village after village of black Africans. Thus, instead of solely tracking down and attacking the black African rebel groups, the GoS and *Janjaweed* carried out a widespread and systematic scorched earth policy against all non-Arab villagers. In doing so, the GoS troops and the *Janjaweed* slaughtered men and boys (including infants); raped, mutilated, and often killed females; looted household goods and animals; and then burned the homes and villages to the ground (Physicians for Human Rights 2005; UN Commission of Inquiry into Darfur 2005; U.S. State Department 2004). As previously mentioned, the attacks generally included bombings by aircraft, frontal attacks by hundreds of armed *Janjaweed* on camels and horses, and a third wave of attacks by GoS soldiers and *Janjaweed* in Land Cruisers and *dushkas* (four-wheel drive vehicles with mounted machine guns). As the UN Commission of Inquiry on Darfur (2005) reported: “. . . the large majority of attacks on villages conducted by the [*Janjaweed*] militia have been undertaken with the acquiescence of State officials” (paragraph 125). The attacks led to the forcible displacement of tens of thousands, then hundreds of thousands, and then, ultimately (or at least through today, August 2010), over two and a half million people in Darfur alone (and more than another 250,000 in Chad). As early as May 1, 2002, a group of Fur politicians complained to Sudanese President Omar al-Bashir that 181 villages had been attacked by Arab militias, with hundreds of people killed and thousands of animals stolen (Flint and de Waal 2005, pp. 77–78).

In what de Waal and Flint (2005) call a “pivotal point” in the conflict between the black African rebels and the GoS troops, the SLA and JEM forces struck the government air force base at El Fasher on April 25, 2003. In doing so, they killed at least 75 people, destroyed several airplanes and bombers, and captured the base’s commander (Flint and de Waal 2005, pp. 99–100). Numerous other attacks were carried out in quick succession. In fact, “[t]he rebels were winning almost every encounter—34 out of 38 in the middle months of 2003. [At this point in time, the GoS purportedly] feared it would lose the whole of Darfur . . .” (Flint and de Waal 2005, p. 101).

Between 2003 and today, the GoS has repeatedly denied that its troops have taken part in the scorched earth actions against the black Africans of Darfur. Indeed, while the rest of the world asserts that more than 300,000 have been killed in Darfur over the past four years (with certain activist organizations claiming that the number is closer to 500,000 or more), the GoS asserts that just 10,000 have been killed, mostly as a result of rebel

actions. However, ample evidence from a broad array of sources (e.g., the black African survivors of the attacks, the African Union and UN troops deployed in Darfur as monitors, numerous humanitarian organizations working in the IDP camps, many human rights organizations [including Human Rights Watch, Physicians for Human Rights, and Amnesty International], and the investigations conducted by the United States in 2004, the UN in 2004 and 2005, and the International Criminal Court from 2005 through 2009) have provided evidence that clearly and definitively refutes the GoS's denials.

By the summer of 2003, various nongovernmental organizations (NGOs) began spreading the word about the escalating carnage in Darfur. In December 2003, Jan Egeland, UN Under-Secretary for Humanitarian Affairs, asserted that the Darfur crisis was possibly the "worst [crisis] in the world today" (United Nations 2004, p. 1). That same month, Tom Vraalsen, the UN Security General's Special Envoy for Humanitarian Affairs for Sudan, claimed that the situation in Darfur was "nothing less than the 'organized' destruction of sedentary African agriculturalists—the Fur, the Massaleit and the Zaghawa" (quoted in Reeves 2003, p. 1).

In early 2004, one activist organization after another in the United States, Canada, and Europe began rallying around the Darfur issue, variously decrying the lack of action to halt the atrocities against the black Africans of Darfur, preparing and issuing reports, calling on the United Nations and/or the U.S. government to be proactive in addressing the crisis, and issuing calls for citizen action. On June 24, 2004, the United States Holocaust Memorial Museum (USHMM) took the extraordinary measure of shutting down normal operations for thirty minutes to focus attention on the ongoing crisis in Darfur. U.S. Senators Sam Brownback and Jon Corzine, U.S. House of Representative Donald Payne, as well as a Holocaust survivor and a member of the Darfurian community-in-exile, came together in a special program in the USHMM's Hall of Witness to highlight and discuss the unfolding conflict in Darfur. On the same day, the U.S. House of Representatives unanimously declared (using relatively limited evidence) that the situation in Darfur constituted genocide.

On June 30, 2004, U.S. Secretary of State Colin Powell visited a camp for IDPs and a refugee camp in Chad. While visiting the IDP camp, Abu Shouk, where malnutrition was rife among the 40,000 or so black Africans, Powell said, "We see indicators and elements that would start to move you toward a genocide conclusion, but we're not there yet" (quoted by the BBC 2004, p. 2).

In July and August 2004, the United States—in a joint effort involving the U.S. State Department, the Coalition of International Justice (CIJ), and the United States Agency for International Development (USAID)—sent a team (the Atrocities Documentation Team, or ADT) of twenty-four investigators to refugee camps in eastern Chad to conduct interviews with

refugees from the Darfur region of Sudan for the express purpose of collecting evidence to help ascertain whether genocide had been perpetrated by the GoS and the *Janjaweed*. The ADT conducted more than a thousand interviews with Darfurian refugees in camps and settlements along the Chad/Sudan border. Evidence collected by the ADT led U.S. Secretary of State Powell to publicly accuse the Government of Sudan of genocide, in a hearing before the U.S. Senate's Foreign Relations Committee on September 9, 2004. This was the first time a government had ever accused another government of genocide during an ongoing conflict.

Ultimately, the U.S. State Department presented the findings of the ADT in an eight-page report, "Documenting Atrocities in Darfur." The analysis of the data collected in the 1,136 interviews by the ADT revealed "a consistent and widespread pattern of atrocities in the Darfur region of western Sudan" (U.S. State Department 2004, p. 1). The data also suggested a "close coordination between GoS forces and Arab militia elements, commonly known as the Jingaweit [*Janjaweed*]" (U.S. State Department 2004, p. 2). Furthermore, the data indicated there was a clear "pattern of abuse against members of Darfur's non-Arab communities, including murder, rape, beatings, ethnic humiliation, and destruction of property and basic necessities" (U.S. State Department 2004, p. 3).

Sixteen percent of the respondents witnessed or experienced rape. Significantly, the report suggests that the rapes were probably "under-reported because of the social stigma attached to acknowledging such violations of female members of the family" (U.S. State Department 2004, p. 7). What makes the underreporting even more probable is the fact that all of the interpreters and half of the investigators on the team were males, and that many female victims were not inclined to mention such assaults in the company of males (strangers or otherwise).

During the course of his report on the ADP findings to the Senate Foreign Relations Committee, Powell remarked that the findings did not mean the United States needed to do anything other than what it had already done. What that meant was this: while the U.S. had called on the GoS to cease and desist its ongoing attacks, submitted and supported various resolutions on Darfur at the UN Security Council, supported and applied sanctions against Sudan, and provided hundreds of millions of dollars for humanitarian aid and material/resource assistance to the African Union contingent on the ground in Darfur, it (the United States) was not about to carry out an intervention in Darfur.

With that said, under Chapter VI of the UN Charter, the United States referred the matter of the Darfur crisis to the United Nations. Subsequently, on September 18, 2004, the UN established the UN International Commission of Inquiry into Darfur (COI), the express purpose of which, as outlined in UN Security Council Resolution 1564, was to conduct its own investigation into the Darfur crisis. The COI conducted its inquiry in November and December 2004

and January 2005, and submitted its report to the Security Council in late January 2005. In its final section, “Conclusions and Recommendations,” the COI report states: “. . . the Commission concludes that the Government of Sudan and the *Janjaweed* are responsible for a number of violations of international human rights and humanitarian law. Some of these violations are very likely to amount to war crimes, and given the systematic and widespread pattern of many of the violations, they would also amount to crimes against humanity” (United Nations Commission of Inquiry 2005, para 603). While many scholars agreed with the conclusions of the COI, others were taken aback that—based on its own findings—it had not concluded that genocide had been perpetrated (see, for example, Fowler 2006, pp. 127–139; Stanton 1996, pp. 181–188; Totten 2006, pp. 199–222; Totten 2009, pp. 354–378).

TALK, TALK, AND MORE TALK BY THE INTERNATIONAL COMMUNITY

Between 2004 and today, the UN Security Council has issued a host of resolutions concerning the ongoing crisis in Darfur. The resolutions have addressed numerous issues, including but not limited to the following: the need by the GoS to halt the ongoing indiscriminate attacks on black African civilians and the forced displacement of tens and hundreds of thousands of the latter; the need for the perpetrators of the atrocities in Darfur to be brought to justice without delay; concern over the GoS’s failure to meet its obligations in ensuring the security of the civilian population of Darfur; disappointment regarding the constant cease-fire violations by all actors; threats to issue various types of sanctions; the issuance of actual sanctions, including the freezing of certain actors’ assets (including those of GoS officials, *Janjaweed* leaders, and a leader of a rebel group); demanding that Sudan disarm the militias operating in Darfur; and the referral of the Darfur conflict to the International Criminal Court (ICC), along with the names of alleged perpetrators of various atrocities.

The results of the resolutions have been, at best, mixed. Some were acted on, but many were not (particularly those that pushed, prodded, and “threatened” the GoS with severe actions if it failed to comply with the UN’s requests/directives). Various resolutions were revised time and again, along with ever-increasing threats, but largely to no avail due to a dearth of action. Tellingly, in July 2006, a senior Sudanese government official was quoted as saying that “The United Nations Security Council has threatened us so many times, we no longer take it seriously” (cited in Nathan 2007, 249).

After considerable debate, compromise, and dithering, the UN Security Council and the United States finally imposed some sanctions on Sudan. For example, on April 25, 2006, the UN Security Council passed a resolution imposing sanctions against four Sudanese individuals, all of whom had been accused of war crimes in Darfur. Those sanctioned were Gaffar

Mohamed Elhassan, an ex-Sudan air force commander, Sheikh Musa Hilal, a *Janjaweed* militia leader, Adam Yacub Shant, a rebel SLA commander, and Gabril Abdul Kareem Badri, a rebel commander with the National Movement for Reform and Development. All four were to be subject to a ban on foreign travel, and any assets they had in banks abroad were to be frozen.

As for the United States, in May 2007, President George W. Bush ordered the imposition of sanctions that prevented thirty-one Sudanese companies (many of them oil-related) and three individuals (two high-level government leaders and a black African rebel leader) from doing business in the United States and with U.S. companies.

Realpolitik was at the center of the dithering, the watering down of certain sanctions, and the decisions not to follow through on numerous resolutions and threatened sanctions. More specifically, various members of the Permanent Five in the UN Security Council (the United States, Great Britain, France, the Russian Federation, and China) had vested interests in Sudan and wanted to protect them.⁹ China, for example, has an enormous petroleum deal with Sudan and engages in significant weapons sales to it as well. Russia also has a major arms deal with Sudan. The United States has intermittently taken advantage of GoS's offers to help shut down terrorist cells within Sudan and prevent potential terrorists from traveling through Sudan on their way to Afghanistan and Iraq to battle the United States in the latter's efforts to capture Osama Bin Laden (terrorist mastermind of the September 11, 2001 attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C.) and to stabilize Iraq following the U.S. overthrow of dictator Saddam Hussein, which resulted in internecine conflict that has ripped the fabric of Iraq apart. Furthermore, already engaged in two separate wars in two Muslim states, Afghanistan and Iraq, the United States was not about to intervene in another Muslim state.

In June 2004, Sudan allowed the African Union (AU) to deploy a small cease-fire monitoring team in Darfur composed of representatives from the AU, the GoS, two (later, three) rebel groups, along with the European Union, the UN, and the U.S. From a tiny initial team of 300 troops, the force slowly increased to—and eventually leveled off at (through December 2007)—about 7,000 troops. “As violence against civilians continued, the African Union Mission in Sudan (AMIS) force's mandate was expanded in October 2004 to protecting ‘civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capability,’” (Human Rights Watch 2007, p. 5). Unfortunately, for all intents and

⁹ Each member of the Permanent Five of the UN Security Council can, alone, with a vote of “no” on any resolution, defeat any motion or vote on an issue. The Permanent Five are the only members of the UN Security Council with such power.

purposes, the new mandate constituted little more than a paper tiger. The AU had neither the resources nor the capability to truly protect anyone, often including themselves.

Between 2003 and today, the international community has worked in various, though hardly effective, ways to bring the Darfur crisis to a close; and in doing so, it has continually decried the attacks by GoS troops and the *Janjaweed* against innocent civilians, as well as the GoS's support of the *Janjaweed* and its murderous behavior, and called on the GoS to reign in the *Janjaweed*. As stated previously, the GoS has vigorously and disingenuously protested the validity of the accusations made by the international community, while periodically making lukewarm promises to bring the situation under control. Such promises, though, have been quickly and repeatedly broken. In most cases, the GoS has blithely ignored the international community's requests, demands, and threats.

When it became obvious that the AU troops were outmanned and outgunned, calls were issued by various actors to place UN troops in Darfur. Initially, the AU adamantly rejected the suggestion, asserting that it wanted to operate an all-African operation. Likewise, Sudanese President Omar al-Bashir was vociferous in his rejection of the suggestion. Time and again, he asserted that any force that entered Sudanese territory without an invitation from the Government of Sudan would not only be in violation of Sudan's sovereignty, but would be perceived and treated as an enemy invasion. On February 26, 2006, for example, al-Bashir asserted, and then warned, that "[w]e are strongly opposed to any foreign intervention in Sudan, and Darfur will be a graveyard for any foreign troops venturing to enter" (quoted in *Sudan Tribune* 2006, 1).

Finally, in mid-June 2007, after immense international pressure, Sudan agreed to allow the deployment of a special force into Darfur, the UN/AU Hybrid (UNAMID) force. Subsequently, the UN Security Council, on July 31, 2007, passed UN Security Council Resolution 1769, which authorized a combined AU/UN Hybrid force for deployment in Darfur. The resolution called for "the immediate deployment of the United Nations Light and Heavy Support packages to the African Union Mission in the Sudan (AMIS) and a [AU/UN] Hybrid operation in Darfur [UNAMID], for which back-stopping and command and control structures will be provided by the United Nations. . . . UNAMID . . . shall consist of up to 19,555 military personnel, including 360 military observers and liaison officers, and an appropriate civilian component including up to 3,772 police personnel and 19 police units comprising up to 140 personnel each." In addressing the mandate of UNAMID, the resolution asserted: "Acting under Chapter VII of the Charter of the United Nations: . . . UNAMID is authorized to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities, in order to: (i) protect its personnel, facilities, installations and equipment, and to ensure the security and freedom

of movement of its own personnel and humanitarian workers, (ii) support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan." By the spring of 2010, UNAMID was approaching its full force on the ground; forces stood at 17,157, constituting 87 percent of its targeted goal of 19,555. However, UN Secretary General Ban Ki-Moon bemoaned the fact that UNAMID mission continued to lack critical equipment, which seriously crimped its effectiveness. While UNAMID seemed to be doing a better job of improving the safety and security of many people in Darfur, Ban said that "there remained serious challenges to the achievement of a lasting peace in the region, not least because of the ongoing reports of violence in many areas of Darfur. . . . I am very concerned at the intercommunal violence in Darfur, which resulted in the highest number of casualties during any reporting period since the inception of UNAMID." He noted that UNAMID continued to be denied access to certain parts of Darfur by various actors, "particularly areas in which clashes have reportedly occurred, such as the mountainous Jebel Marra region, which has significantly constrained the mission's ability to implement its mandate regarding the protection of civilians" (UN News Center, 2010, p. 1).

Talk, Talk, and More Talk About Peace

In early September 2007, U.N. Secretary General Ban Ki-moon asserted that a new round of peace talks, which were to begin on October 27, 2007 in Libya, must result in "a final settlement of this issue" (quoted in the *International Herald Tribune* 2007, p. 1). At best, that seemed wishful thinking. As the *International Herald Tribune* (2007) noted, "Darfur has a history of peace talks—their sheer numbers a testimony to their lack of success. . . . Since fighting began in 2003 between ethnic African rebels and the Arab-dominated Sudanese government, there have been over half a dozen cease-fires or peace deals of various formats—all quickly breached by both sides" (p. 1).

In fact, beginning in 2004 and continuing through today, peace talks between the GoS and various rebel groups have been on-again, off-again affairs, with agreements often being broken by one or both sides within days, if not hours, of the signed agreements. In various cases and at various points in time, the intransigence of the GoS and/or other rebel groups has placed one barrier after another in the way of finding a workable solution to the crisis in Darfur. The GoS has broken agreements both blatantly (attacking black African villages with Antonov bombers, helicopter gunships, and GoS troops and the *Janjaweed*) and surreptitiously (white-washing planes, attaching UN insignias on the wings and sides of the planes, and using the planes to transport weapons and personnel into

Darfur).¹⁰ Various black African rebel groups have not only reneged on agreements, but have purposely prevented other rebel factions from taking part in the peace talks. Those rebel groups denied a seat at the talks almost automatically threaten not to honor anything that results from the talks.

Over the years, various rebel groups have treated their counterparts as enemies and engaged in battles with them. Not only that, but the various factions—in 2007, for example, the UN estimated there were up to twenty-eight declared rebel factions (Gettleman 2007)—to this day continue to shoot and kill civilians, rape black African women and girls, attack and kill AU troops, and harm and kill humanitarian aid workers.

Each rebel faction is eager to be involved in one series of peace talks or another, and each no doubt has its own motives for doing so. Certainly many, if not most, are anxious to have their say regarding the fate of Darfur. And, as previously mentioned, all are undoubtedly cognizant of the newfound wealth and power that those residing in the south garnered (and/or will potentially garner in the future) as a result of the Comprehensive Peace Agreement that finally brought to an end the twenty-year war between northern and southern Sudan.¹¹

A peace agreement in Darfur was finalized in May 2006 (see details below), but it was signed by only one of three negotiating rebel groups—the SLA faction led by Minni Arkoy Minawi. Despite the peace agreement, the *Janjaweed* not only continued to attack black Africans but began fighting amongst and between themselves; the various rebel groups continued to battle GoS troops and the *Janjaweed* and also began fighting between and amongst themselves and attacking black African people in their villages and IDP camps. Exacerbating the entire situation was the fact that bandits roamed (and continue to roam) the region, attacking anyone and everyone, including IDPs and humanitarian workers. Disturbingly, and tellingly, in a report titled *Chaos by Design: Peacekeeping Challenges for AMIS and UNAMID*, Human Rights Watch (2007) asserted that “the [GoS]

¹⁰ On August 24, 2007, Amnesty International (AI) presented photographic evidence that the GoS continued to deploy, via airplanes (Antonovs) and helicopters, military weapons in Darfur in clear abrogation of UN arms embargo and peace agreements. AI also asserted that it had received reports of GoS helicopters delivering arms to Arab militias who work closely with the GoS. AI also claimed that the GoS continued to deploy attack helicopters to the region (Amnesty International 2007, 1).

¹¹ Following a complex series of talks during 2002 and 2003, a Comprehensive Peace Agreement (CPA) was signed in Nairobi on January 9, 2005. The CPA provided for the sharing of power between the Government of Sudan (GoS) and leaders of the SPLM and determined that the main rebel leader, John Garang, would become the first vice president of Sudan. (As noted earlier, shortly after Garang became first vice president, he died when his helicopter crashed during a storm.) An important provision of the CPA called for the sharing of revenues from oil, which had begun to be pumped in 1999, between the north and the south of the nation. Six years after the signing of the CPA, in January 2011, the south will be permitted to hold a referendum for self-determination and potential independence.

continues to stoke the chaos, and, in some areas, exploit intercommunal tensions that escalate into open hostilities, apparently in an effort to 'divide and rule' and maintain military and political dominance over the [Darfur] region" (p. 1). The latter continues to be true through today (October 2010), despite the GoS's words and actions vis-à-vis bringing peace to Darfur.

THE DARFUR PEACE AGREEMENT (DPA)

Following seven rounds of contentious negotiations, the Darfur Peace Agreement (DPA) was signed in May 2006. However, as Fadul and Tanner (2007) aptly put it, the peace accord was "stillborn" (p. 284). While the DPA was signed by the GoS and the Minni Arkoy Minawi faction of the SLA, it was signed by neither the SLA faction led by Abdel Wahid Mohamed al Nur nor the Justice and Equality Movement led by Khail Ibrahim. Within a short period of time following the signing of the DPA, battles between the non-signatories and the "government coalition," which included the SLA faction headed by Minni Arkoy Minawi, broke out.¹² Even greater violence was perpetrated by GoS troops and the *Janjaweed* against both black African rebel groups and black African civilians. As the attacks by the latter increased in number, there was a surge in the rape of girls and women, the murder of black African civilians, and the number of villagers seeking sanctuary in internally displaced persons camps or refugee camps in Chad. Due to the fear of being murdered should they venture outside the IDP camps, black African men insisted that girls and women scavenge for wood needed to build fires to cook food, even if it resulted (as it often did) in females being raped by GoS soldiers and the *Janjaweed*.

Because of the ongoing violence, black African Darfurian civilians understandably looked askance at the viability of the DPA. As Fadul and Tanner (2007) note, there were also other reasons why the black Africans found the DPA a dubious proposition, and they included the lack of attention to: "... compensation [for the destruction of their villages and homes and the theft of their worldly goods], the rehabilitation of infrastructure, basic services, and reconciliation" (p. 286). The overriding concern, though, was the fact that "people always stressed these [compensation, rehabilitation of the infrastructure, reconciliation, etc.] were secondary to security" (p. 286).

As the violence continued unabated month after month in the aftermath of the signing of the DPA, many black African Darfurians began asserting that

¹² The signing of the DPA by Minni Arkoy Minawi did not bode well for either him or his faction. Not only did his faction lose battle after battle with the rebel groups that refused to sign the DPA, but his men began to defect to the other side. By September 2006, it was estimated that up to 75 percent of his men had joined the non-signatory rebel groups. Furthermore, and understandably, many Darfurians began to look askance at Minni's collaboration with GoS troops and the *Janjaweed*. It certainly didn't help that Minni had also accepted a position within the Government of Sudan: advisor to Sudanese President al-Bashir.

“there could be no peace unless it was forced on the government militarily. In other words, peace depended on one of two things, a non-consensual deployment of Western troops or a rebel military victory—or both” (Fadul and Tanner 2007, pp. 287, 288). Continuing, Fadul and Tanner (2007) observed that

[a]s late as 2004, many Darfurian intellectuals criticized the decision to take up arms against the government. The brutality of Khartoum’s reaction was predictable, they argued, and the violence had cast the region back many decades. By late 2006, it was striking to hear many of those same individuals say they believed armed rebellion was the only solution to Darfur’s problems, despite disenchantment with the shortcomings and human rights abuses by rebel groups on the ground (p. 288).

In early December 2007, the UN Under Secretary General for Humanitarian Affairs, John Holmes, informed the UN Security Council that “280,000 people had been forced to flee the violence in Darfur this year [2007], that attacks on aid workers and their convoys had reached ‘unprecedented levels’ and that national authorities were closing off access to areas ‘where there are tens of thousands of civilians in severe need’” (quoted in Hoge 2007b, p. A10). The Human Rights Council in Geneva reported that “from June 20 to mid-November [2007], at least 15 land and air attacks were carried out against civilian centers in Darfur by government troops and their affiliated militias and one faction of the rebel Sudanese Liberation Army” (Hoge 2007b, p. A10). As duly noted in the aforementioned newspaper article, the GoS was not the only guilty party; rebel groups were increasingly attacking IDP camps and threatening, stealing, and seriously harming (beating, shooting, and killing) IDPs and aid workers.

As a result of the ongoing fighting and massive displacement of civilians, a vast number of black African Darfurians began to look askance at the efforts and credibility of the African Union mission (AMIS) in Darfur. More specifically,

[n]ot only was AMIS weak but it was increasingly seen as partisan. The AU’s role in imposing the DPA on the non-signatories compromised its neutrality in the eyes of those groups. In August, when the AU expelled the non-signatories from the AU-chaired Ceasefire Commission and AMIS was seen providing logistics to the forces of SLA-Minni amid escalating violence, many Darfurians concluded that the AU had taken sides (Fadul and Tanner 2007, p. 308).

Such concern and doubts underscored for many the perceived need for the deployment of an international force in Darfur. The GoS, however, was still not entirely amenable to such an idea. Although the GoS repeatedly agreed to the deployment of an international force, it also repeatedly withdrew its agreement. Only incessant pressure from the international community finally forced the GoS’s hand.

THE ONGOING CRISIS: UNABATED VIOLENCE AND THE MIXED REACTION OF THE INTERNATIONAL COMMUNITY

The deployment of the AU/UN Hybrid Force (UNAMID) met one barrier after another. Well into December 2007, the GoS resisted the inclusion of non-African military personnel into the new force, the latter of whom were considered critical to the mission. The GoS also refused to provide land to the hybrid force, which was needed for supplying and housing troops. Likewise, the GoS refused to ease visa and travel restrictions, and was “blocking support staff and materials from the area through bureaucratic maneuvers” (Hoge 2007a, p. A5). The GoS asserted its right to “close down the [hybrid] force’s communications when its own army was operating in the area and was refusing to give United Nations planes clearances to fly at night” (Hoge 2007a, p. A5). The GoS was making a mockery of its so-called promises to allow for the deployment of the hybrid force, and it was drastically impeding the international community’s intention to provide black African Darfurians with the protection they desperately needed.

If the above impediments were not enough of a hindrance to the deployment of the AU/UN hybrid force, by November 2007 not a single country had donated helicopters for the force. Without such equipment, the force’s mobility and effectiveness were sorely restricted.

While the beginning of 2008 (January 1) saw UNAMID deployed in Darfur, the violence continued unabated in various regions. Black Africans continued to be terrorized, threatened, and killed by the *Janjaweed*. Fighting between the rebel groups and the GoS continued unabated as well.

In January and February 2008, the GoS sent planes, ground troops, and the *Janjaweed* into West Darfur to attack four villages, all purported rebel strongholds, killing some 115 people—including children, women, and the elderly—and displacing some 30,000 people. The perpetrators looted and burned homes, shops, schools, and other edifices in the villages. In certain cases, civilians were burned alive in buildings. A UNAMID report issued on March 20, 2008 asserted that the January and February 2008 attacks by the GoS troop and the *Janjaweed* against black African villages in Darfur constituted “violations of international humanitarian and human rights law” (n.p.). The report further claimed that “the scale of destruction of civilian property, including objects indispensable for the survival of the civilian population, suggests that the damage was a deliberate and integral part of a military strategy” (UNAMID 2008).

As of February 2008, only 9,000 UNAMID troops had been deployed to Darfur. The dire nature of the situation was underscored when, in the same month, Balla Keita, the commander of the UN African Union Peacekeeping Force in West Darfur, asserted that more troops were desperately needed.

It was projected that UNAMID would gradually gear up and that by midyear it would reach its full complement of 26,000 soldiers. It was

hoped that UNAMID would be more effective than the 7,000 AU troops, who proved largely inadequate as they were forced to watch as the black Africans were attacked at will by GoS troops, the *Janjaweed*, bandits, and, in not a few cases, rebel groups.

In their own ways, both the GoS and the international community continued to impede the so-called peacekeeping mission in Darfur. The GoS established a rash of conditions and regulations, including the refusal to allow UNAMID to use helicopter gunships in Darfur. As for the international community, it continued to issue more lip service than help to the mission. As a result, UNAMID continued to try to operate without badly needed helicopters. Finally, in March 2008, Russia pledged several desert mobile helicopters to the UNAMID force. They were added to helicopters given by Ethiopia and Bangladesh. Still, UNAMID sorely lacked the number of helicopters needed to carry out the mission in an effective manner.

In late July 2008, The Darfur Consortium, a group composed primarily of African aid agencies and advocacy groups, lashed out at UNAMID, asserting that it was too small and was failing to provide adequate protection for civilians in the area. A sore point was the fact that the force had deployed only 9,000 of the 26,000 soldiers promised. While acknowledging that the report addressed a host of critical issues, UNAMID force commander General Martin Luther Agwai retorted that too much was expected of UNAMID. "For anybody to expect that 8,000 troops and under 2,000 policemen would police an area as big as France, that person [is] daydreaming," he said. "With no roads, no means of communication and you expect UNAMID forces to be everywhere, I think is too much of an expectation" (quoted by ABC News July 28, 2008). A UNAMID spokesman agreed that the situation was unsatisfactory but stated that UNAMID had not received the resources it needed to do the job properly. He cited the mission's dearth of helicopters and armored vehicles needed for patrolling such a desolate and huge area, as well as the fact that some peacekeepers did not even have UN helmets and thus were using blue plastic bags in place of helmets to show they were with the UN. On July 31, just two hours before UNAMID's mandate was to expire, the UN Security Council renewed the mandate for another year.

On July 8, the ICC's chief prosecutor, Luis Moreno-Ocampo, announced that he had evidence to prove Sudanese President Omar al-Bashir was guilty of genocide. In response, the African Union issued a resolution calling on the UN Security Council to postpone the ICC case against al-Bashir in order to avoid complicating matters on the ground in Darfur and jeopardizing the ongoing peace efforts. The AU further argued that "in the current circumstances a prosecution may not be in the interest of the victims and justice . . ." In doing so, the AU invoked Article 16, which allows the UN Security Council to suspend prosecutions for a period of twelve months and which can be renewed indefinitely. Not surprisingly, China, Libya, and Russia were in favor of the resolution, but Great Britain, the U.S., and France objected.

Ultimately, a compromise was worked out. The United States abstained in the final vote, asserting that the language included in the resolution would send the wrong message to the GoS and its president, Omar al-Bashir.

On October 17, 2008 al-Bashir traveled to Darfur, calling for a national vision for peace. Rebel groups, including SLM/Unity and JEM, refused to attend, calling it a sham and an effort by al-Bashir to avoid arrest and prosecution by the ICC. Continuing to try to appear the peacemaker, al-Bashir called, on November 12, 2008, for an “immediate and unconditional cease-fire” in Darfur, but the two largest rebel groups asserted that they would continue fighting until the government agreed to act on their grievances. The very next week, GoS planes carried out bombing attacks on Kutum in Northern Darfur, and the UN reported that fighting was taking place around Tine in Western Darfur and along the Sudan/Chad border.

In December 2008, the Darfur Consortium issued a report that hundreds, and possibly thousands, of black African women and children from Darfur had been kidnapped during the course of the Darfur crisis and forced into slavery by GoS troops and the *Janjaweed*. The women, the report noted, were kidnapped when the GoS and *Janjaweed* attacked black African villages, forced to walk to military camps where they were gang raped, and forced to work in the fighters’ fields and homes. The report also asserted that other females were flown across Sudan and forced to marry GoS soldiers. Those black African children who were kidnapped and flown across Sudan were forced to serve as domestics for soldiers and their families. “The government bears a direct responsibility for these violations as they have generally been carried out by government forces or militias which the government of Sudan established and supported,” said Dismas Nkunda, co-chair of the Darfur Consortium.

In late December, the head of UNICEF in Sudan charged that up to 6,000 children—some as young as eleven years old, and many against their will—were serving as soldiers alongside GoS troops, as well as with the main rebel groups (including the SLM/A and JEM). This was clearly in violation of both Sudanese law and international agreements (United Nations Radio 2008).

On February 17, 2009, the Sudanese government and JEM signed a declaration of goodwill in which each agreed to work toward bringing peace to Darfur. Subsequently, in February 2009, Qatar hosted the first peace talks held in almost two years between the GoS and JEM. During the course of the talks, both sides agreed to pursue “good faith” measures. In March, however, JEM called off the peace effort as a result of the Sudanese government’s expulsion of thirteen NGOs from Sudan.

On March 4, 2009, the ICC issued an arrest warrant for Omar al-Bashir. Al-Bashir was charged with seven counts of crimes against humanity (including murder, extermination, forcible transfer, torture, and rape,) and war crimes (for intentionally directing attacks against civilians and for pillaging), but not with genocide, as chief prosecutor Luis Moreno-Ocampo

had requested. It was the first arrest warrant ever issued for a sitting head of state by the ICC.

Following the issuance of the warrant, the GoS expelled thirteen international humanitarian groups from the country and grabbed their assets. The various groups warned that as a result of their operations being shut down, up to one million people's lives could be placed at risk.

At a rally in Khartoum a week after the ICC issued the arrest warrant, al-Bashir vehemently rejected the charges. On March 8, 2009, while in Darfur, he thumbed his nose at the ICC and the international community when he told cheering supporters in El Fasher that Sudan would not allow the "recolonization" of Africa.

In an exclusive interview with the BBC on May 12, 2009, al-Bashir both denied and rejected as propaganda that his troops had targeted any civilians in Darfur. And, as he had been wont to do ever since the crisis broke out, he cavalierly dismissed the international community's estimate of the number of dead resulting from the crisis in Darfur. This time, though, instead of claiming that the number who had perished was 10,000 (versus 300,000 to 400,000, as estimated by the international community), al-Bashir said that the number of those killed in Darfur during the six-year crisis was "less than one tenth of what has been reported" (Coalition for the International Criminal Court 2009).

In mid-June, a brouhaha broke out within the White House over how to describe the ongoing situation in Darfur. On June 17, 2009, the United States Special Envoy to Sudan, Scott Gration, claimed that the Sudanese government was no longer carrying out a "coordinated" program of mass murder in Darfur, thus implying that the U.S. no longer considered the situation in Darfur to be a case of ongoing genocide. "What we see is the remnants of genocide," Gration told reporters at a briefing in Washington. "The level of violence that we're seeing right now is primarily between rebel groups, the Sudanese government and . . . some violence between Chad and Sudan" (quoted in Lynch 2009, p. 1). Gration also advocated easing U.S. sanctions on Sudan and strengthening U.S. diplomatic relations with the GoS in order to bring about more cooperation. Gration's assertion, however, was in direct contrast to comments made earlier in the month by both U.S. President Barack Obama and U.S. Ambassador to the UN Susan E. Rice. At a press conference in Germany on June 5, Obama used the phrase "ongoing genocide" (ABC News 2009). And on June 15, just two days prior to Gration's assertion, Rice, at The International Peace Institute Vienna Seminar in Austria, said:

Humanitarian requirements will often jostle with other legitimate policy concerns. It does no good to pretend that priorities do not sometimes compete—and even where they do not, even where our values and our interests fall neatly in step together, the answers are not always obvious. Again, consider Sudan, where we simultaneously face the genocide in Darfur, the recent expulsion of critical international NGOs, a

faltering North-South peace process, and the risk of new instability in various parts of the country. The urgency and complexity of the overall situation can distract us from addressing adequately any single imperative, and indeed, the reverse is also a risk (United States Mission to the United Nations 2009, p. 2).

In August 2009, UNAMID force commander General Martin Luther Agwai declared that “the war between the GoS and rebels was over” (quoted in Pflanz 2009, p. 1). “As of today, I would not say there is a war going on in Darfur,” Gen Agwai said in Khartoum. “Militarily there is not much. What you have is security issues more now. Banditry, localized issues, people trying to resolve issues over water and land at a local level. But real war as such, I think we are over that” (quoted in Pflanz 2009, p. 1). Anti-genocide activists and various rebel groups decried Agwai’s comments, with the activists basically condemning the comments as absurd. “This is incredibly premature. To say the war in Darfur is over directly contradicts what we see on the ground,” said Colin Thomas-Jensen, policy adviser for Enough, the anti-genocide project based at the Center for American Progress in Washington. “There may be a lull in the violence, but you cannot say that it is over. There is no political settlement and no political process to resolve the conflict. Neither side is defeated and the government is building up its arms stockpile” (quoted in Meldrum, 2009, p. 1). Corroborating Thomas-Jensen and providing a more realistic appraisal of the situation than Agwai, the International Crisis Group (ICG) (2009) noted that “[t]he Darfur conflict has changed radically in the past two years. While there are fewer deaths than during the high period of fighting in 2003–2004, the conflict has mutated, the parties have splintered, and the confrontations have multiplied. Violence again increased in 2008 while access for humanitarian agencies became more difficult. International peacekeeping is not yet effective and a political settlement remains far off” (p. 1).

The ICG was absolutely correct in its assertion that the situation in Darfur had changed radically over the years. The fact that many more rebel groups are now involved in the crisis, along with the influx of bandits, carjackers, and kidnappers, has resulted in a much more chaotic situation. But to suggest, as Agwai did, that the fighting between the GoS and the rebel groups (or the attacks by the GoS and the *Janjaweed* against black African civilians) is a thing of the past is ludicrous. The point is, as previously noted, the violence has ebbed and flowed over the years and continues to do so. Regarding the situation in 2008, the ICG (2009) noted that “[a]ttacks by both government and rebel forces continued throughout the entire year of 2008. . . . In turn, an assault on Khartoum by Justice and Equality Movement (JEM) rebels in mid-May 2008 left at least 200 dead and was a milestone in the Darfur conflict, constituting the first military strike on the capital in 30 years” (p. 1).

Despite the wishful thinking of UNAMID commander Martin Agwai and U.S. Special Envoy Scott Gration, the fighting in Darfur was far from over. In early September 2009, GoS troops and the *Janjaweed* carried out a major military offensive in the Korma region of North Darfur. In fact, heavy fighting continued throughout September, resulting in the murder and displacement of thousands of black African civilians.

October and November 2009, however, proved to be relatively quiet. That is not to say that there were not periodic clashes between rebel groups and the GoS and the *Janjaweed*, because there were. Still, in a report to the UN Security Council, the Panel of Experts Established Pursuant to Resolution 1591 Concerning Sudan reported the following on October 27, 2009:

Most of the major armed actors in the Darfur conflict have continued to exercise their military options, violate the United Nations arms embargo and international humanitarian and human rights law, and impede the peace process. The Darfuri population continues to be victimized by the effects of attacks and counter-attacks involving most of the armed movements that frequently lead to the disproportionate use of force by the Sudanese Armed Forces (SAF) and their auxiliary forces, and result in killings, injuries and displacements. Internally displaced persons continue to suffer from the inability to return to their homes and from acts of banditry, as well as from the lack of adequate humanitarian services, partly caused by the expulsion of international nongovernmental organizations on 4 March 2009. . . . The Government of the Sudan, while demanding respect for its privilege as a sovereign State, also falls short in exercising transparency and accountability. Government officials often object to inquiries made by the Panel under its mandate and offer lip service while committing sanctions violations. . . . The Government of the Sudan remains intransparent and unwilling to account for its efforts to disarm and control its various auxiliary and formerly affiliated forces, in particular combatants commonly referred to as members of Arab tribes or as *Janjaweed*. . . . Many individuals identified by internally displaced persons as *Janjaweed* continue to carry arms and engage in frequent violent behaviour against and harassment of internally displaced persons and, according to the Panel's findings, enjoy impunity for their offences. . . . In the aftermath of the issuance by the International Criminal Court of an arrest warrant against the Head of State of the Sudan, the Panel has received reports of severe violations of international humanitarian and human rights law, involving the harassment, persecution and torture of collaborators and individuals opposed to Government policies (UN Security Council 2009b, p. 1 of Summary).

Just a half a month later, on November 16, 2009, UN Secretary General Ban Ki-Moon issued a report (Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur [UNAMID]) in which he asserted the following: "In the context of [the] ongoing violence, freedom of movement continues to be a serious concern for UNAMID and many of the agencies in Darfur. Since January 2009, there have been at least 42 incidents in which UNAMID patrols were denied passage by Government officials, including incidents in which Government officials

specifically threatened the safety of UNAMID staff and equipment” (UN Security Council 2009b, p. 3).

In November, the GoS made an announcement that seemed only to exacerbate matters; seemingly out of the blue, on November 10, 2009, the Sudanese government reported that it planned to begin closing down IDP camps in Darfur in 2010. It stated that it planned to build some 20,000 housing units for the IDPs in the capitals of each of the three Darfur states. Purportedly, the IDPs will be able to move into the new houses or return to their villages. Various Darfur rebel groups responded to the idea with anger. For example, Abdel-Wahid Al-Nur, leader of Sudan Liberation Movement (SLM), asserted that “[t]he government wants to send our people back to the same places they fled from so that they can get killed again under the whole world’s eyes” (quoted in the *Sudan Tribune* 2009). Similarly, Ahmed Hussein, a spokesman for the Justice and Equality Movement, said the GoS’s plan is a “cover-up for a new crime the government intends to commit similar to the one in Kalma camp (e.g., the August 2008 killings of IDPs by government troops). . . . It is classic of them to do so” (quoted in the *Sudan Tribune* 2009).

Then, on December 4, twenty Rwandan UNAMID peacekeepers who were providing protection for a water tanker were attacked by unknown gunmen in Saraf Umra (a government militia stronghold) in North Darfur, resulting in the deaths of three soldiers. The very next day, another group of UNAMID soldiers—this time providing water to civilians in Shangil Tobaya in North Darfur—were ambushed by gunmen and two Rwandan soldiers with UNAMID were killed.

Not surprisingly, the violence in Darfur continued right into 2010. In fact, in early February UNAMID announced that it was “increasing their security presence in and around the region” in order to attempt to prevent a further escalation in the violence that had recently broken out in Jebel Marra, South Darfur, and Jebel Moon, West Darfur, which resulted in the deaths of many and the dislocation of thousands.

Tellingly, throughout the summer of 2010 the security situation in Darfur continued to be dire as a result of ongoing fighting between the GoS and various rebel groups. U.N. Secretary-General Ban Ki-Moon asserted that “May [2010] was in fact the deadliest month in Darfur since UNAMID has deployed.” UN officials estimated that about 400 people lost their lives in May and some 160 perished as a result of aerial bombings by the GoS in June. The UN also reported that U.N. staffers and aid agencies continued to be denied access by the GoS to those places where fighting was taking place (Peter, 2010, p. 1).

ICC Arrest Warrants

On May 2, 2007, the International Criminal Court (ICC) issued arrest warrants for Ahmad Muhammed Harun (Ahmed Haroun), Sudanese minister of

Humanitarian Affairs, and Ali Muhammed Ali Abd-Al-Rahman (a.k.a. Ali Kushayb), a senior leader of the *Janjaweed* since 2003 and allegedly a key figure in planning and carrying out attacks on civilian populations across Darfur. The charges spelled out in the arrest warrant for Harun state that he was responsible for murder, rape, torture, forced displacement of civilians, and outrages against the personal dignity of girls and women during the course of the attacks. The ICC warrant also states that Harun was allegedly responsible for encouraging the aforementioned illegal acts in public speeches during his tenure as Sudanese Minister of State for the Interior. The ICC warrant for Kushayb is based on the fact that he allegedly led several thousand militia members and personally participated in attacks against civilians that involved murder, rape, and inhumane acts. Sudan categorically refused to extradite Harun and Kushayb. In September 2007, not only adding fuel to the fire but once again thumbing its nose at the international community and the international criminal justice system, the GoS appointed Harun co-chair of the committee appointed to hear victims' cases of human rights abuses in Darfur.

On November 20, 2008, in an ongoing effort to bring charges against those allegedly guilty of perpetrating atrocities in Darfur, the ICC's chief prosecutor, Luis Moreno-Ocampo, presented evidence against black African rebel commanders who were reportedly responsible for an attack on Africa Union peacekeepers at Haskanita, South Darfur, in September 2007.

Following an extensive, multiyear investigation, Moreno-Ocampo concluded that Sudan had committed genocide in Darfur; on July 14, 2008, he applied for a warrant for Sudanese President Omar al-Bashir's arrest on charges of crimes against humanity, war crimes, and genocide. On March 4, 2009, following its examination, analysis, and discussion of the prosecutor's application for the warrant, the majority of ICC judges in the pretrial hearing case (two of the three) rendered a decision that resulted in the warrant charging al-Bashir with crimes against humanity and war crimes, but not genocide. One of the three judges, Judge Anita Usacka, wrote a powerful dissent in which she delineated why she believed that Chief Prosecutor Moreno-Ocampo's request for a warrant on charges of genocide made sense and should have been honored.

Upon receiving the majority's decision, Prosecutor Moreno-Ocampo filed an appeal on July 6, 2009 contesting the dismissal of his application for a warrant for the arrest of al-Bashir on charges of genocide. In doing so, he spelled out why he thought the majority opinion/decision was incorrect.

On February 3, 2010, the Appeals Chamber of the International Criminal Court judged that the ICC judges in the pretrial chamber case had to reconsider the prosecutor's request and thus decide anew whether the arrest warrant should be revised to include the charge of genocide. In doing so, the Appeals Chamber made it abundantly clear that it was not concerned with the issue of whether al-Bashir was responsible for the crime of genocide, but rather with procedural law (i.e., whether the Pretrial Chamber applied

the correct standard of proof when rendering its final decision vis-à-vis the prosecutor's application for an arrest warrant on the charge of genocide). On July 12, 2010, after reconsidering the ICC Prosecutor's request for a warrant for genocide for al-Bashir, the Pre Trial Chamber judges issued a warrant for al-Bashir's arrest for genocide in Darfur. It was the first time the ICC had issued an arrest warrant for the crime of genocide. The warrant was for al-Bashir's alleged role as an indirect perpetrator or indirect co-perpetrator of genocide in Darfur through killing, causing bodily or mental harm, and deliberately inflicting conditions of life calculated to result in physical destruction.

CONCLUSION

As the international community dithers, innocent people in Darfur continue either to be murdered; die as a result of malnutrition, dehydration, and lack of medical attention; and/or suffer rape at the hands of the GoS troops and *Janjaweed* (and, increasingly, members of some of the rebel groups). Seven long years have passed since the start of the crisis in Darfur, and the international community continues to engage in talk over real action in an "effort" to ameliorate the problems that beset Darfur. Unfortunately, Darfur is a stark reminder that the world is no closer to solving or halting—let alone preventing—genocide than it was during the Ottoman Turk genocide of the Armenians (1915–1923), the Soviet manmade famine in Ukraine (1933), and the Holocaust perpetrated by the Nazis (1933–1945). The same is true, unfortunately, regarding the sexual assaults against girls and women that have been perpetrated time and again during periods of violent conflict.

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Interviews

The interviewee (name has been deleted for the sake of confidentiality) was born in 1972 in Andukeria, near Geneina in West Darfur. He is a Massaleit. He completed seven years of schooling. He first worked as a tailor and then as a trader in produce.

The interview was conducted by Samuel Totten on June 10, 2007. Hussein Idriss served as the translator. It was conducted in the Gaga Refugee Camp in Eastern Chad. It was conducted under a lean-to within a larger compound with the respondent, interviewer, and interpreter sitting on multicolored rugs.

I lived in Goker during the attacks. Goker is between Habilia and Geneina. Its population was about 2,600. I left Goker about one month ago.

The trouble in Darfur started long ago, in Darfur in 1994 and in Goker in 1995. Before, there were not a lot of camels in our area and then, in 1995, more than 20,000 camels arrived. These camels, when they came along, they destroyed everything. These camels were looked after by Arab people, and the camels ate the plants that were growing, and the Arabs told us, "You can't do anything about it." When this happened, the people reported it to the police and the police went and saw the Arabs and the police came back and said, "These people are our people and we won't do anything to them." The head of the police are Arabs, and they have a program [an agreement] with the Arabs to destroy us. All of the farms were destroyed, including mine. They [the camels] ate all of the grain and plants.

After the rainy season, after the farms were destroyed, the war between the Arabs and us began. In my own family, two of my cousins, farmers, were killed. They went to the *suq* [open air market], and when they were returning, Arabs killed them, Arabs who had camels. The Arabs would stay in between villages, and when our people visited friends or family members, the Arabs would rob and kill our people. They were criminals. This was the beginning of the *Janjaweed* [Arab militia who have conducted attacks, largely in conjunction with the troops of the Government of Sudan, on the villages of black Africans].

Because my cousins and others were killed at this time, all of our tribe members came together and fought the Arabs for six days and chased them a way. Many of our people died, and a lot of Arabs were killed. [Of] our people, 190 were killed. All were fighters. I, too, fought with [against] those Arabs. We had no real weapons [in our homes or villages], but we got weapons (spears, and pistols and rifles purchased in the suq) when we fought them. They had horses and camels and Kalashnikovs and GEMs [shorter rifles than Kalashnikovs].

I was shot in the hand by a bullet. At the time I just salted the wound and bandaged it. I still do not have feeling in my thumb.

When we fought, the Arabs told us this country [Sudan, and particularly the region of Darfur] was not to be inhabited by slaves. When the Arabs were being [beaten], some started to run, but others called out, "Don't run away from the ibid [slaves]" and "This is a jihad [a holy war] against the slaves!"

After the battle, the government [Government of Sudan] helped the Arabs and gave them horses, camels, and money and weapons. And soon after, about one month, more Arabs came and attacked again. They came from different areas in Darfur, and from Chad, and even Abeche [a major town in Eastern Chad. Gaga Refugee camp is located near Abeche]. And the fighting continued through 2000. There was no solution unless you fought. There was no security.

We would set up ambushes because we knew the Arabs would attack us again. So we were ready. Mothers of fighters would often come out to where we were fighting and beg their children to return. Most of us, though, would tell our mothers we were going to a meeting and not tell them we were actually going to fight. We knew the Arabs would attack us in the village if we didn't ambush them, and we didn't want that. The Arabs come from as far away as Libya, Mauritania, and Egypt to fight us, and some are Palestinians.

As for my mother, she told me, "You must fight even if you die because you are defending your people." Everyone knew if something wasn't done the Arabs would sneak up and attack and kill everyone. Of course, my mother feared that I would die.

In 2000, General Mohammed Ahmed Mustafa Deby came to meet with representatives of the Massaleit and Arabs. He said he was a representative of the President of Sudan, [Omar] al-Bashir. In the meeting, the representatives of the Massaleit told the general that we were here before the Arabs came to Africa and all the [other black African] tribes came to our areas and they lived peacefully, but the Arabs came and started killing our people, and so we fought them. The general said he was there to make a peace between us and the Arabs, but he was deceiving us. Two months after this agreement, the Arabs started killing the leaders of the Massaleit,

and even some of the politicians inside Geneina [El Geneina, the capital of Western Sudan].

After this, the Arabs started eliminating the educated people. There was a man named Ahmed Abdouffrag, an engineer, and he went to Khartoum to ask the government to build roads in the Massaleit area, and he was killed in his home upon his return. This was in 2000. Some Arab people drove up to his home, called him out, and shot and killed him.

Others who were killed were Ibrahim Darfour, who was head of the legislative body in Geneina. His wife was head of the Women's Union in Geneina. They were both killed the same day. They shot and killed them both. This, too, was in 2000.

People outside Geneina, leaders of other villages, were also killed. Saleh Dakoro, *umda* of Mornei, was killed in 2001. He went to Geneina and on his way back some *Janjaweed* shot and killed him.

Yacoub Congor, another *umda*, was also eliminated in 2001. He was in the *suq* in Habila and about thirty-five *Janjaweed* came into the *suq*, searched for him, and shot and killed him.

In 2002, the Arabs established their own villages in our areas. When our people were killed by the Arabs and went to the police, they [the police] said, "That's a tribal problem and we have nothing to do with it." But if a Massaleit killed even one Arab, the police would collect other police from other areas and even call the army and then come and attack the village [of the Massaleit] where the Arab was killed.

The police would also go to other villages and arrest Massaleit [in retaliation for the one killing]. The police have a weapon called Fang, which is a rocket-propelled grenade [RPG], and they would take the powder out of the shell and put it on the head of people and set it on fire and it would explode like diesel [petrol]. I saw this with my own eyes.

You should know, all those people (non Arabs) who were in Darfur and worked for the police, the army, and security were all taken out of Darfur and moved away to other parts of Sudan, and they were all replaced by *Janjaweed*.

They had another weapon [form of torture] where they would tie you to two vehicles—your arms to one and your legs to another—and they would drive off in separate directions, pulling your body apart.

And many people were arrested and taken to the security office, and many of those people have never been heard from again. And it's the *Janjaweed* who run the security office. All were red people [in Darfur both Arabs and black Africans refer to Arabs as being red, even though they are brown and even black skinned; likewise, non Arab blacks are referred to, by both Arabs and blacks, as black Africans].

Around May 2002, Arabs from different nations were brought into Idel-ganim to train them [local Arabs] and to help them establish a state made up of Darfur, Chad, and the Republic of Central Africa. Al-Bashir [the

president of Sudan] visited the camp and changed the name from Idelganim to Idelfoursan. He changed the meaning of the location, the camp, from “where goats live” to “where brave men with horses live.”

Massaleit from our tribe who are red [brown or at least not dark black] like Arabs went into the training camps and posed as Arabs. Seven days after, Omar al-Bashir visited the camp. Osama Bin Laden gave them [the Arabs] camels as presents. This place is east of Nyala in the village called Idelganim, near Korodfan. When these groups began moving about in Darfur, they were referred to as *gowat alsalam* [Peace Force]. When they attacked, they would come in with 400 to 500 men on horses, surround a village, and destroy it. And this was how our village was destroyed.

This day, about seven in the morning, in some villages near us, we saw horses, I cannot say the number, and three vehicles and helicopters. The helicopters would land and take off, but I don’t know what they were doing. And we saw planes, all gray, Antonovs [Russian-made transport planes], come and go, and we heard the dropping of bombs.

I left our village before it was attacked. We all fled right away, and I went to the police station and military in Goker [the regional headquarters of Goker]. The village was burned down. I could see that as I was fleeing. We, many, many villagers, people from over forty villages, about 6,000 people, stayed there [in internally displaced persons (IDP) camps in Goker]. I stayed there from that time until one month ago, when I came here [Gaga camp in Eastern Chad]. Some organizations came there and helped us—such organizations as Red Cross and Oxfam. I never returned to my village. There was nothing I could do there. The huts were built of grass and thus nothing would remain after the fire.

In the village, there were about 700 cows, 9 camels, and more than 2,000 goats, and 19 horses. I personally lost 28 cows and 61 goats.

So, from November 2003 to last month [June 2007], I was in an internally displaced camp. While our IDP camp was not attacked, it was not peaceful. Women could not go out to collect firewood. If a woman went outside the camp, the *Janjaweed* would rape her. If they stayed inside, the government did not help provide wood for cooking. A man can’t go out because if you go out yourself you’ll receive one bullet [meaning, a man will be shot and killed]. The government also interferes with the distribution of food. They, and the *Janjaweed*, try to prevent it from being given out.

The African Union [AU] troops had an office in the IDP camp, but there were very few men—only about thirteen. But when there was a crime, such as the rape of a woman, we’d tell them and they would say they would look for the criminals, but they always came back and said they couldn’t find them.

I think some of the African Union troops are on the side of the *Janjaweed* and the government of Sudan. I say this because the *Janjaweed* bring the

troops sheep and milk. We can see with our own eyes they bring such things. What else they may bring, we do not know.

It is also true some of the African Union troops truly help us. For example, the Rwandese soldiers are very good and helped us. So did troops from Eritrea. But troops from Nigeria, Chad, Cameroon, Egypt, and Libya are working for their own benefit, not the benefit of Darfur. For example, if a person like you comes to speak to me during the day, the *Janjaweed* and GoS troops will come at night and take me and kill me. And if something happens to you [meaning, black Africans], the Egyptian troops will even laugh.

Another time, in Misterei, where there are a lot of AU soldiers, the *sug* was attacked and two people, two traders, were killed and the market was looted, all by the *Janjaweed*, and all the AU soldiers did was take photographs during the attacks. Nothing else!

One time, a journalist spoke to a person in our camp and that night some people—I'm not sure if it was *Janjaweed* or security people in the camp—went to his house. The man, though, thought there might be trouble, so he had left his hut, but only after placing materials in his bed to make it appear he was sleeping there. Men burst into his room and fired four shots into the bed. The next morning we went to the African Union to report this, and the African Union soldiers went and got more soldiers, from all different countries, plus a man from a rebel group [the Justice and Equality Movement or JEM], and took them to the man's house. When the soldier, who was from Egypt, saw the bullets, he smiled. We told the one Rwandese soldier who was there that the killers would be back that night and asked him to take the man who was in danger to Geneina. The Rwandese soldier agreed, but the Egyptian said no. We took the Rwandese soldier to the man who was hiding and when the soldier was about to take him to Geneina, the Egyptian said, "No, he is not to be taken there." The Rwandese soldier said, "Yes, he will be. It's our job to protect people." So, the Rwandese soldier took him to Geneina and the Egyptian just stood there and allowed him to do so.

The problem is truly worse than before—that is, worse with the African Union troops. Before they came, everyone knew there was ethnic cleansing (*tathir irgi*) and mass killing (*ibada jamia*), but after the AU came, because they insisted on coming in to show they were doing something to help, all they do is take photographs and talk. And the violence continues. So, it's worse now, because there was hope there'd be real help, but there's not. The situation is the same, but the hope is gone.

We stayed in the IDP camp for a long time, and we hoped that with the African Union, the situation would be better. But it never was, so we decided to leave and come to Chad.

Several small villages between Geneina and Mornei were attacked at six in the morning, and I saw a lot of horses and dust and vehicles, Toyota Land Cruisers. The people who were being attacked fled toward our village.

Many rode horses and many came on foot. And the enemy, the *Janjaweed* and the GoS, was chasing them, and we, too, fled.

As we were fleeing, the *Janjaweed* would halt women with babies and force the women to show whether their children were boys or girls. And if they caught a woman and she had a male child or a baby who was a boy, they would kill him. They would take the baby boy and throw him on the ground and stomp on his throat and kill him. In other cases, they would throw the baby boys into the fire to burn alive. If the baby was a girl, they would leave her alone. The same for little girls. But if the girls were thirteen, fourteen, fifteen or older, they often took them away for three or four days, and they [the girls] would often come back. But some never came back, and we still don't know what happened to them. And when the enemy caught a man, the man was killed.

Not from our village but others, people I know, were taken and made slaves. The attackers would say in front of the people, "You, I am taking as a slave!" They would force such people to watch their animals as herders. They don't take big people [adults], but young boys about eight or nine years old.

The last days before I came to Gaga there was interference by the government [of Sudan] in the work of the international organizations. What I mean is that one organization was formed by the Sudanese government, and when they distributed food to us, they told us we wouldn't get any food unless we went back to where we came from. This began two months before we came here [Gaga refugee camp in Chad]. Then, when you returned to your village, they would come and take pictures and pass them around and say, "Everything is all right." They would bring food once or twice, but then the *Janjaweed* would come and kill you. I refused to go back, as did my friends.

When we refused to return to our villages for fifty days, we did not receive any food. And there were no other organizations providing food for any of us. The only way we were able to eat is that we *knew* the future could be worse, so while we were [still] receiving three meals a day, we only ate two meals; and when we started receiving no food, we began to eat only once a day.

During this time, just by accident, some journalists passed [three men and one woman] by our camp, and we told these journalists we had no food for fifty days, and the journalists reported this to a human rights organization. A human rights organization came to see us after seven days, and when we told them our problem, they reported it to the Red Cross and the Red Cross brought us food, and three days later, the other organization [the Sudanese organization] packed up all their food and left and never came back.

This is my daughter [indicating a little girl sitting in his lap], and I named her Condoleezza Rice. Her complete name is Condoleezza

Mahjoub Oumar. I want to give Condoleezza Rice [the U.S. Secretary of State at the time] this girl, my daughter, who is two years [old]. Because Condoleezza Rice came to visit us in Darfur when we were in a very bad situation. I have no means to contact Condoleezza Rice to tell her that I want to give her my child, and I wish I did.

Many people work for Darfur—the African Union, the United Nations, Kofi Annan [Secretary General of the United Nations]—at one point, however, he [Kofi Annan] gave the *Janjaweed* three months to turn in their weapons; can you imagine how many people could be killed in that time?—Condoleezza Rice and Colin Powell [the U.S. Secretary of State who preceded Rice] worked more than all these others to help us. So, we do not forget people who help us, who help Africa. I wish I had a boy and a girl, because then I would give the boy to Colin Powell and the girl to Condoleezza Rice. I also know that Condoleezza Rice has no child and thus I would like her to have my first child.

The respondent (name has been deleted for the sake of confidentiality) is about thirty years old. [She was not sure of her date of birth thus her approximate age is a guess.] She was born in the village of Tolos in West Darfur, which is near the larger town of Mornei. She is a Massaleit.

This interview was conducted by Samuel Totten on June 10, 2007. It was conducted in the Gaga Refugee Camp in Eastern Chad. It was conducted under a lean-to, where the interviewee, interviewer, and interpreter sat. Approximately ten to fifteen family members (e.g., her children, mother, sister, nieces and nephews, and others) sat nearby and stood on the periphery listening in on the interview.

When our village, Tolos, was attacked I was living with eight people in my home—my six children, me, and my husband. Our village was attacked four years ago. I can't remember the month, but it was about two months after Ramadan.

In the morning, early, we were taking breakfast, and we heard the planes. They are too [very] loud; from far you can hear them.

The planes came first, then the trucks, and then the horses and camels. Some [*Janjaweed*] were on foot. The planes, Antonovs, flew over the village. They [the planes] were all white and the sides were red. They [three or four of them] dropped big things like *binil* [barrels], and they made fire. Everything caught fire: buildings animals, people.

The planes dropped the big things, and about twenty minutes, after the Land Cruisers came. Some were green color, some were black and green [camouflaged]. There were many, I don't know how many because at the time I was scared, but it might have been about 100. They came from all directions.

When we heard the big things [bombs] falling and hitting, we ran out of the house, but we didn't know where to go. The big things caused big holes, like wells.

Driving the cars [Land Cruisers] were Sudanese soldiers. Most *Janjaweed* rode horses, camels, and were on foot. On the trucks, they have a big gun [she is most likely referring to what are called *doskas*], and the soldiers held big guns, some red and some black [Bilgic, possibly of Italian make]. There were also *modra* [tanks] with men inside, but you can't see them. Outside there is a big gun and everything was colored black and green. There were about ten *modra*. The camels and horses and Land Cruisers were more than hundreds and hundreds. They were crying loudly as they came in, calling out "Nuba! Nuba!" [In such a context "Nuba" is used as a racially derogatory term directed at black Africans; it is used as a synonym for "blacks" but with a negative connotation.]

At that time, we were ten persons, and we began running. I was with three of my sisters, my sister-in-law, my father's two sisters, and three were my neighbors. All of my children had run in fear, and I didn't know where they were. My husband, too [was gone and she did not know his whereabouts].

We ran outside the village to the west. There was a lot of shooting, but none of us got hit. I was so frightened I left the village without my two babies and little four-year-old daughter who were inside our hut. I later found them because someone had grabbed them and run out with them.

As we were running, I saw men from our village being shot. They killed twenty-seven men. They [the soldiers and *Janjaweed*] aimed at the men. I saw two of my fathers [her father's two brothers; in other words, her uncles, who are generally referred to as "fathers" by the black Africans] killed. We didn't have any guns in our village, and they [the Government of Sudan troops and the *Janjaweed*] did all of the shooting.

I was looking and crying and running, but what can I do? I was so fearful I didn't stop running, and I was hysterical, crying and running. After the attack, we came back to our village and we found the dead bodies.

We ran for three days, to Habila. No food and no water. Not for twenty-three days did I find my one son [name withheld for the sake of confidentiality], finally, out in the bush. On the way out, we came across my husband, who had two of our other sons in the bush. Then we went to Habila. We had nothing. Sometimes we went to the bush for firewood, but we were attacked by the *Janjaweed*.

We returned to our village after ten days. When we made it back, we did not find anything but bodies.

Our animals, our cows, our sorghum, our millet, our clothes, nothing was left. Nothing. It was all burned, destroyed. The whole village was destroyed.

We found three who were injured in a small valley, in different places. All three had been shot—one man in both arms and both legs and the other man in one leg and the other one in his hand.

We took the injured to Mornei on donkeys and then they [the injured] were taken in automobile to Zalingei, east of Geneina. The people with

the cars were black, but I don't know if they were an organization or not. They were Sudanese, but I don't know where they were from. There was no hospital in Mornei and so they took them to Zalingei. The three are still living, and one is here (in Gaga camp) in Block 7 and two are in Mornei.

When we left the village to return to Habila, we came across the *Janjaweed* again, out in the bush. The *Janjaweed* were shooting guns, and we began running. Because we are [were] far away, we could not hear what they were yelling at us. They followed us, but not too closely and then left.

In Habila, we stayed without any work; sometimes we went into the bush to get firewood that we sold to buy food. We stayed there for two years, in an internally displaced persons camp.

Life was not good in the camp. There was not enough food, and if you left the camp, the *Janjaweed* would sometimes beat us. There was not freedom.

I was attacked by the *Janjaweed*. We, men and women, were cutting firewood, and they stopped us and beat us. They beat us with sticks for two hours. One person was injured very badly from the beating, and he had head injuries that left him feeling unwell [possibly a concussion or a more serious injury that left him permanently damaged].

Another time I was also out with five women and three girls (thirteen years, fourteen years, and fifteen years) gathering firewood, and the *Janjaweed* raped the three girls and a woman. We were about two hours from the camp, and we were on foot.

When we first arrived at the area with the wood, the *Janjaweed*, about twenty of them, were on camels and horses and came up on us very quickly. One of them said, "We already took your land, why are you around here? We use your land and now we are going to use you."

We all started running away, and four of us got captured, three girls and one woman. One girl who was captured was my sister's daughter, who was thirteen years old. From the morning until the evening, the *Janjaweed* kept the girls and the woman.

When we reached the camp, we told the mothers of the daughters about the capture of their daughters, and the mothers went out and brought their daughters back on donkeys and took them to the hospital in Habila. The four were badly injured because of the rape and the woman spent five days in the hospital and the girls were in for ten days. The girls were raped by many men, some by five, some by ten.

From the four girls, one got pregnant and had the baby. She was the one who was fifteen years. She is still in Habila with the baby from the *Janjaweed*. When the girl's father heard about the baby from the *Janjaweed*, he got very angry and sick from his anger and died [possibly from a heart attack]. He was fifty. He was not sick before that, but when he heard what happened he died.

We came to Gaga camp about one year ago. When we were in Habila, there was no way you could go out without trouble from the *Janjaweed*.

When we were in the Habila camp, the *Janjaweed* came three times at night and attacked the camp. One time, they killed four guards, all [of whom] were Massaleit. So, it was not safe to stay there.

From Habila, we, sixteen of us [me, my mother, my mother's sister, my own sister, my husband, my father, my six children, my husband's sisters, my husband's brothers] went to Geneina and from Geneina to Adre, and from Adre [in Chad, along the Chad/Sudan border] to Gaga. In the *suq* in Habila, we found a car to take us to Geneina. We stayed for two days in Geneina, in the station of cars. Already we were forced out of Sudan [Habila] and Geneina is in Sudan, so we did not want to stay. From Geneina we found a direct car to Adre in Chad. In Adre we stayed for two days. In Adre there is no camp or organization to help, so we did not want to stay there. We reached Gaga by [the] car we hired.

In Gaga, it took one month and ten days to get a tent. At that time, we lived outside the camp. Because there are many Massaleit in this camp, they would come out to see us and give us food.

The life in camp [the UNCHR camp in Gaga] is very difficult, but what can we do? There is no other way. When we first arrived, everything was fine, but now there is not enough food, not enough water, and not enough medicine.

With my husband and I live our four children and my mother. Before, we got food every two weeks, then it went to one month, and now we have not had food for two months. So now we have to go outside of the camps and work for Chadian people, and they give us money and with it we buy millet. Sometimes we buy sugar and sometimes okra, and sometimes meat for our soup. We have had meat one time in months. We buy sugar more often because we like tea, so if we have money we can buy it every day; if not, then we don't. If we have money we also buy okra every day; if not, we don't.

One day we get water, and the next we don't. It's not regular. We don't know why this is so. If we don't get water in the camp, we have to walk one hour on foot to get water out of the well. We get one *baka* [jerry can] of water from the well. I am the one who goes for the water and the *baka* with the water is very heavy, so I can only carry one.

My baby [a little girl sitting alongside her who had a very large distended stomach], one and a half years, has had diarrhea for one year, and we have seen a doctor here in Gaga ten times, and he gave us medicine, but it didn't do any good. We tell the doctor and he gives more medicine, but it doesn't do anything.

And when I make water [urinate], I feel very hot inside. This has gone on for three months. In Habila, I went to the doctor and got medicine for it and I felt better, but here I go to the doctor and the medicine he gives me makes me feel no better.

I don't have a lot of hope. If the Americans bring peace to Darfur and bring security, then maybe life will get better, but here [in Chad], I don't

think so. If the UN [peace force] goes to Darfur, we'd like to go back to our country.

The interviewee (name has been deleted for the sake of confidentiality) was born in 1977 in Doroti. He is a Massaleit. He is a farmer and a sheik. Prior to seeking refuge in Chad, he lived in Hela Zakawa.

Samuel Totten interviewed the interviewee on July 12, 2007, in the UNCHR refugee camp, Farchana. Hussein Idriss served as the translator.

I live here with my wife and three children, all girls, who are seven and a half years, five years, and ten months. I crossed from Sudan into Chad at the end of 2003, and came here [Farchana] at the beginning of 2004.

In 1997, the Sudanese government organized a group of armed people with horses, camels, and vehicles, and they attacked villages around Goker [in West Darfur]. When they attacked these villages, about eighty-five people, all Massaleit, were killed.

In 1998, some armed Arabs in military uniform, at the beginning of the rainy season [July, August, and September], entered the villages and kept ordering people to not plant anything. This was a way of destroying some [black] African tribes.

We refused to obey them, and we told them that the land was our land and to go and find other land. The armed people left and organized, and at the end of the rainy season they began to attack villages. "You black people have no right to stay on this land," they screamed at us. At this same time, the armed people began to block the roads, and when we tried to go from one village to another, they would harass us.

In 1999, the Arabs began to attack villages early in the morning, and if they found a man they would kill him. And even if they found a boy, they'd kill him, too.

In February 1999, they attacked Hela Zakawa. At six o'clock in the morning I was at my house, and I heard the sound of *doshkas* and a *Ha* (a 120-millimeter weapon) and we, all the neighbors, went to see what was happening. The attackers, both *Janjaweed* and *Jesh*, were coming into the village. The *Jesh* were in vehicles, some big lorries, dark green, and Toyota Land Cruisers; some were gray and some were camouflaged. All the attackers wore khaki uniforms. The only way I could tell the difference between the attackers was that if anyone wore a turban, they were not from the government [thus not a soldier but a member of the hired militia largely comprised of nomadic Arabs].

When I first came out of the house, I saw *Jesh* and *Janjaweed* shooting. There were about fifteen of them. I saw my grandfather-in-law shot and killed. They, the *Janjaweed*, were *krourouking* [a high-pitched, very eerie sound].

The *Jesh* and *Janjaweed* saw me and began shooting at me. God didn't decide that I would die that day.

In front of us [he and a friend], there was a thick grove of trees about 200 meters from the village, and we entered that. There was a small dry *wadi*, and I hid myself between the thick branches of a tree. My friend went off in a different direction. I hid there for about four hours. I stayed there until the shooting became less.

While I was hiding, I heard the whopping sound of the helicopter, a gray helicopter that was circling, but there was so much shooting I didn't know if it was firing on people or not. When I came out of the trees, I could see the smoke, clouds of it. I decided to return to our village, and as I got closer I saw that about half of the village had been burned down and that some fences and houses were still burning. As I continued on, I saw a lot of dead bodies. Some [people] were injured, shot up, and some dead.

Some I could recognize, a total of six of them. Ibrahim Adam, an old man, about fifty years [old], who had been shot in the leg, could not move. He was crying for water, but I had no water. Abdullah Khamiss, thirty years, was shot in the neck, and when I found him I stayed with him, but after one hour he died. Mohammed Gamar, twenty-two years, had been shot in his eye, and the bullet had gone out the back of his head. He was alive, but he could not speak. He died shortly, right where he had been shot. Mohammed Ahmed, forty years, had both of his legs badly cut by a knife, probably by a *satour* (a knife butchers in the area use to slice meat), and the wounds were very deep. When I found him, he was dying and could not speak. Mohammed Yaha, about eighteen years, had a chest wound from a bullet. This man, I found already dead. Yahya Adam, another old man, fifty-eight years, was shot in his side, and his kidneys were hanging out. He, too, I found dead. On that day, fifteen people were killed, but what I've told you is what I remember seeing.

I continued on and came across other people who were looking for their family members, and I told them about the injured people I had seen. That same day, I and others buried the dead. We were afraid the *Janjaweed* and *Jesh* would come back, but we could not leave the people like that. We dug four holes, and we buried all fifteen people in such holes.

The same day, I went to my house and saw that it was looted. Nothing was left. All of my animals were also looted—twenty cows, thirty sheep, and two donkeys.

After we buried the people, we went back to the little *wadi* and slept there. Everyone slept away from everyone else to keep safe. I woke up about four o'clock in the morning, and I started looking for my family—my wife and children. There were about fifty people who were looking for their family members. We didn't enter the village that morning, but we went to several neighboring villages [Yrcousri, Jadulta, and Wading Nyala].

After seven days of searching, I didn't find them in any of the villages. I became like a sick person because I feared all of my family members—my wife and my children—were dead, had been killed. I just kept wandering and searching for them, but it did no good. In the last village, on the seventh day, I thought, "my family's dead," and I gave up.

Then, on our way back to our village, we ran into a man we knew who was traveling between the villages of Jadulta and Wading Nyala, and he told us that many people had crossed the border into Chad and that we should go and see the people in Chad.

Right away we went to Chad, which was about twelve kilometers away. We crossed at the border where there was a forest of mango trees, and we entered the village of Wendolo in Chad. All of the displaced people were under trees. There were about 1,000 people, and I searched among them and found them—my family—in about thirty minutes. My wife thought I had been killed and was happy, of course, that I was alive.

I told my wife that her grandfather was killed. She was very distressed and broke down.

That night I slept under the trees and then continued my search for my mother, my seven brothers, two sisters. But I didn't find any of them. I then returned to my village because I thought other members of our family might still be back there, as my mother was weak and old and possibly was being cared for by my brothers or sisters. I went to my mother's house, but I didn't find her there. Later, I found her, with my two brothers, outside of the village in the small *wadi* under the trees, and later, in the same area, I found my two sisters. We all prepared for the trip to Chad, putting my mother on a donkey for the trip.

For four months, we stayed under the trees, as did most of the other 1,000 people. For food, some Chadian people with a relief organization brought us fish in cans. We got water from the *wadi* that divides Sudan and Chad, Wadi Kaja. When we went to get the water at the *wadi*, the *Janjaweed* and GoS [troops] would often attack us, killing some, and stealing our animals. Throughout our time there, there was constant circulation of GoS helicopter gunships along the border. They never came across the border to attack, but if they saw a group of our animals they would shoot at them.

Women always went for water because if the men went they could be killed by the *Janjaweed* and GoS. Often the *Janjaweed* and GoS would catch the girls and rape them. That was very common.

After four months, some Chadians in the Chadian government came and told us we must move, go to another place. Many of us said, "No, we don't want to go to another place! We'll return to our village." And so, gradually, in groups, we began to return to our village. Some, though, stayed in Chad but moved to another place called Absogo.

So, I returned to our village with my wife, children, mother, two brothers, and my sisters. Half of the village was destroyed, burned. My house

was one of those that were burned down. My mother's home, too. And my sisters' homes, too. So we made some shelter from trees and rebuilt the houses, which took about one month and a half to do. We also began farming again. First, though, we had to purchase a new plow.

In 2001, again in 2002, and again in 2003, the *Janjaweed* and government brought camels on to my land, my farm, and destroyed my crops. There were 100, sometimes 200, camels, and they would remain for about ten days. You see, in October we harvest, but they would bring the camels in September to eat all of the plants—millet, sorghum, groundnuts, [peanuts], tomatoes, okra, and watermelon. I had ten *fadan* [about five hectares of land], and all were planted. And all was destroyed. No plants or vegetables were left. And so we had to go and find food by other means, such as going to work for other people. So, I not only lost all that food but my means of living, for I would have taken the tomatoes, okra, watermelon, and groundnuts to the *suq* to sell.

I could not chase the camels away because if I did the GoS and *Janjaweed* would've shot me. Even if you reported this problem to the police, the police would not come and help you. And actually, if you are black and you go to complain, the police would tell you that it's forbidden to make such a complaint. You see, all of the police officials are Arab.

We planted all over again during the next rainy season because farming was our only means of living, and we also thought they would not destroy our crop a second time. And even when it happened a third time, you must understand, farming was our only means of existence—we know no other way, and if we left for Chad we could get no land.

The first time we went to the camel owners and told them this was our land, that we had planted it, and that we had not harvested the crops yet. They told us, "No you're Nuba! This land is not yours. This is the land of the Arabs." There was nothing I could do; if I continued to argue, I would be shot.

This happened to everyone in the village. All of them! All of the people had to seek work elsewhere in order to live.

The second time this happened, some villagers went to speak to the camel owners, and they were shot and killed, so no one else dared confront them.

The third time, they came in very early in the growing season. At that point, people in the village gave up farming, and went to work in the *suqs* in other villages. And then the *Janjaweed* and GoS began attacking the *suqs*. During one of the attacks, I was shot by the *Jesh*. This was in the *suq* of Arba, near Moule. Fifty-eight people were killed in this attack, which took place in 2003 in February.

The attack took place at two o'clock in the afternoon, and I was preparing to do my prayers. I had just finished ablutions and was entering the mosque when I saw vehicles, gray Land Cruisers, and horses of the *Janjaweed*. The

attackers started making *krourouk* and shooting at the mosque and at the people in the mosque. They, of course, knew all the people would be gathered in the mosque [at that particular time of the day].

I was shot four times: in the knee, the lower thigh and the upper thigh (and that bullet came out the shin bone), and my chest, very near my heart. I fell to the ground and as soon as I did the attackers began beating me with the back of their Kalashnikovs and GEM (rifles that are longer than the Kalashnikovs). They beat me in the back, repeatedly, but I pretended I was dead. Throughout this, the shooting continued. They, the *Janjaweed* and GoS, entered the mosque and as they did, they fired their weapons. They killed many people inside the mosque.

The attack went on for about one hour. They looted all of the stalls in the *suq* and stole all of the animals.

The entire *suq* was destroyed. They shot rockets [rocket-propelled grenades or RPGs] and shelled it with Fang [a weapon with a big barrel] They were also firing from the *doshkas* into the marketplace.

People who were running away were also shot with the *doshkas*. After the attack, a helicopter gunship circled the area, and it attacked groups of people huddled together. And later, those who were trying to bury dead family members and friends were also attacked by the helicopter gunship.

After the attackers left, I sat up and people came to help me. I was taken to my home, where my family washed me with soap and water and I was given some antibiotics. There was no hospital in the area. We don't even have a doctor in our area. I stayed at home for six months as I recovered. I could not work. As I recovered, my brother provided food for us and helped us.

In October 2003, there was a general attack all over the area. The attack started east of our villages, and, at that time, the attacks also came from the Chadian border area. After six or seven days, our village was attacked, too. As the attacks were carried out against the other villages, villagers from our village began moving in small groups over to Chad. We didn't all go at once because if you move in large groups, you will almost certainly be attacked.

Before our village was attacked, my mother, my wife and children, and my sister left for Chad two days before I traveled there. I then traveled over with my three brothers. We knew if the men were seen, they [the women and children] would possibly be killed, so we had them leave alone so if anyone was to be killed it would be us and not them.

I need to tell you, the *Janjaweed* and the GoS would put up a long, long thick cord stretching for about twenty meters along the roads. And people traveling could not see such a cord at night, and when they tripped over it, it would send a message to the *Janjaweed* and GoS and they would race in to kill everyone they could. We didn't trip over it, but others before us did.

Our movement was only during the night. You could not move during the day. At daybreak you would hide among the trees and wait until night to continue the journey. After two days, we arrived in Chad, in a place

called Absogo—the same place where those fellow villagers of ours went who had remained in Chad. When we reached there, we met all of our family and we remained there for about twenty days. On the twentieth day, *Médecins Sans Frontières* arrived, and after that, the UN. We remained there for one month and a half, and then UNCHR brought us here [Farchana]. They brought buses for women and children, and they transported the men and older boys in trucks.

MSF treated those who had been shot and had various illnesses. They also carried out an investigation, asking about the missing members of our family.

When we arrived here, the camp was much smaller. There were only three blocks; today there are twenty-six blocks. At the time, the tents were already up and enter tents right away. After a long time, I built the fence around [my] tent and planted the plants.

Here [Chad], we are not happy because there's no work to make money to help your family. We want to return to Darfur, but we will not return until the problems are solved. I wish to ask the international community to do its best to solve the problems.

Sudan itself is not a good place, but since we have no work here to make money, we would like to return.

The respondent (name has been deleted for the sake of confidentiality) was born in 1970 in Conde-Mornei. He is a Massaleit. He works as a mechanic for the flour mill in the UNCHR Refugee Camp, Farchana.

This interview was conducted by Samuel Totten on July 13, 2007. It was conducted in the Farchana Refugee Camp in Eastern Chad. Initially, the interview was conducted under a lean-to in the compound of a friend of the respondent, and when rain began to pour down, the interviewer, interpreter, and interviewee ran down several dusty paths to the interviewee's tent and continued the interview inside. The ground within the relatively spacious UNCHR tent was covered with colorful rugs, and bags of goods were neatly piled along the back and sides of the tent. Hussein Idriss served as the translator.

I had been living in Sawani [in West Darfur] prior to and during the attacks. I had lived there for about twenty years. The attacks by the *Janjaweed* and GoS started in 1997, and they were against the villages in our area, and many people were killed in such attacks.

The first attack was during the rainy season in 1997, and we were working at the farm and they attacked our village. It was around four o'clock in the afternoon. I first heard shooting. It was the firing of an automatic weapon, a Kalash [Kalashnikov].

We went directly toward the enemy, and we fought them with our spears as well as another locally made weapons made by blacksmiths, a gun that fires one bullet, a *Tatagee*. Few people, though, had *Tatagees*.

There were about twenty soldiers and *Janjaweed*, and about fifteen of us. Many of us had spears, some guns, and there were some with no weapons.

We were able, though, to chase them [the *Janjaweed* and GoS troops] out [of the village].

Some days later, about eleven o'clock in the morning, the GoS and *Janjaweed* returned to our village and the battle continued. This time they shot one of my cousins and he was killed. He was shot in the groin; I saw it, he was right in front of me. The battle lasted about twenty minutes. God helped us, and only one of us was killed.

Because of the attacks, we felt we could no longer farm there [safely]. The men were ready to fight, and so the women worked the farm.

We were attacked again one month later. This time the attack was early in the morning. We were fighting, and some people [other black African villagers who lived in adjoining villages] came from the outside, and they [the attackers, GoS troops and/or *Janjaweed*] killed two of those people from the outside. This battle lasted about two hours. During this battle, the GoS and *Janjaweed* burned down a nearby village.

Nine months later, in January 1998, soldiers of Omar al-Bashir [the president of Sudan] came into the village, selected some people, and arrested them. I was among them. They arrested twelve men. We were twenty-seven years [old] to forty years. We were all taken to a detention center, Arda Mata, in El Geneina. Arda Mata is a military base. At the prison they hung us up, in turn, by our ankles with our hands tied together. The rope around the ankles was attached to a large hook, the way meat is hung. They beat us as we were hanging there. A government soldier by the name of Shukortalla beat us with an iron bar on our shinbones. They wanted us to suffer so we would give them information. They asked us, "Why do you fight people when they go to your village?" And they said, "We arrested you because you fight the *Janjaweed*." They wanted all sorts of information about us and the village. They beat us for about thirty minutes. Some of the men who were arrested with me died from the beatings.

As for me, they beat my legs until I was bloody and when the blood came, they beat in that place again. As the others were beaten, I could hear the beatings and their crying. We were held at the detention center for twenty-seven days, and each day we were beaten, but not with the iron bar—only Shukortalla beat us with the bar—with sticks. And after twenty-seven days we were taken to prison on the military base. We were not beaten there, but they only gave us a little food, not enough. I was among the first released. Some were kept for three months longer than me. And as I said, some of the other men I was arrested with died in prison from the beatings. Some were close friends, and one was a family member, my nephew who was in his thirties. He died of injuries from the beatings of his kidneys, liver, or other organs.

When I got out, I went to Habila, because my brother was there. I stayed for ten days. I went there just to recover.

After the ten days, I returned to my family in my village. Only one day after my arrival, the government attacked my village again. This time the

government troops came alone, searching the houses for weapons. They did not find any weapons in the village, but they came and picked me up because they said some suspicious people had entered the village. I said, "I will cooperate with you. What do you want?" And they said, "We want you to show us the whereabouts of such people." So I took them, on purpose, to some places where there were no people. The other groups of soldiers arrested two people because they said they had weapons. The two people arrested were from another village. I told the soldiers that one of the men I knew very well, and I knew he had no weapons. The soldiers said, "okay," and took the other man away but left my friend.

The military continued like this, and as they found what they thought was a strong man, they would arrest him. They wanted to weaken us.

At this time, the Arabs and government would come together. The Arabs would bring their animals, their camels, and when we told them to leave, the Arabs would say, "No, you don't argue with me; you argue with the Kalash [Kalashnikov]." We couldn't fight them because the government was helping their people a lot.

And this is the routine that went on through 1999, 2000, 2001, 2002, and 2003. There were many, many attacks, and many people were killed—so many attacks I could not tell them all to you.

In 2000, two of my cousins were killed. One was coming back from the *suq* and passed a village, Hashaba, that was being attacked by the GoS, and he was killed. Another cousin heard the attack and went to the other village to help, and he, too, was killed.

In 2003, February 11, another cousin of mine was killed in an attack on our village. This was part of a massive attack on the villages in our area. The *Janjaweed* and GoS were lined up outside the area of the villages, and the line stretched across the desert facing all of the villages. If one were to start at one end of the line and walk to the other end, it would take him more than eleven hours. The attack also involved Antonovs and attack helicopters.

A lot of the people escaped to Mornei, but, then, inside the town, the government soldiers ordered them all to lie down, and when they lay down, the soldiers shot them all with automatic weapons. My sister was one of them. Altogether, about seventeen people were killed in this way.

There was one Antonov over our village, and it was dropping bombs. One bomb fell on my aunt's house, destroying everything. She was outside the house and survived. Another aunt was hit by fragments of a bomb dropped from an Antonov. Three others were killed immediately, but she survived. Her chest was slashed open, and when she reached here [Farchana], she was taken to Abeche and operated on. The three other people she was with, who were killed, their body parts splattered, with many body parts left hanging from the limbs of trees.

Other people were escaping toward Mornei, and they, too, were killed. Other people who breathed the poison gas from the bombs dropped by the Antonovs died here [in Farchana] because they remained ill from

the bombing. The bombs left a terrible smell in the air. When the bombs hit, a white mist arose in the air, followed by black smoke. We came here [Farchana] in March, and in April they died.

The respondent (name has been deleted for the sake of confidentiality) is about twenty-five years old (she does not know the month or year she was born). She was born in Krenik-Habila Kanar, which is located in West Darfur. She is a Mas-saleit. She is a farmer. She was married at fifteen years of age and had one child in Darfur. She never attended school.

This interview was conducted by Samuel Totten in Farchana on July 13, 2007, sitting on a rug in the small compound (a tent and a cooking area closed off by a fence made of branches and twigs) of the interviewee. Hussein Idriss served as the translator.

The attack on my village [Krenik-Habila Kanar] was in 2003. Omar Bashir [the president of Sudan; she is, in fact, referring to GoS troops] began attacking villages in our area during Ramadan, but the attack on my village came after Ramadan, early in the morning. The sun had not risen yet. I was cooking inside my compound, and I heard weapons and vehicles racing in fast. My child was with me. I took my child and some clothes, and I ran out of the house.

As soon as I entered the road, many soldiers approached and stopped me. They wore khaki uniforms and had green army hats. They immediately began asking me, "Where is your man?" And then they began hitting me. Many of them hit me at once. They beat me as my child was wrapped on my back. The sticks were thick. The beating lasted for about five minutes. Throughout the beating, they were calling me a prostitute, "you zurga" [a highly derogatory and inflammatory term that is rough equivalent to the use of "nigger" in the United States], and were saying things like "You only know how to grow groundnuts [peanuts], so you are not good for anything."

They ordered me to take the baby, four years [old], off my back and told me if it was a boy they were going to kill him. I took the baby and unwrapped her and showed them she was a girl.

They also threatened, "You wait until we burn the village, and you can bury the ashes of your house."

After they took the clothes I was carrying, they let me go. Two big planes, Antonovs, were flying over the village and dropping bombs. I saw the bombs thrown from the plane, and when they hit they exploded with fire. The houses caught fire. The bombs and the fire killed people. I saw people falling down and not getting up. At least fifty people were killed. I personally saw five persons killed.

The respondent (name has been deleted for the sake of confidentiality) was born in 1965 in Doroti-Al Maraga. He is a Massaleit. He is a farmer.

This interview was conducted by Samuel Totten on July 13, 2007. It was conducted in the Farchana Refugee Camp in Eastern Chad. Hussein Idriss served as the translator.

In the past, the relationship between us [black Africans of Darfur] and the Arabs was very good. The Arabs would come to our village and ask for our *umda*, and we would bring them the *umda* and they would ask the *umda* if they could stay on some of our land and say that they would only be staying a short time, and the *umda* would allow them to do so. If the *umda* was not available, then the sheik would handle the situation. The Arabs needed the use of our land to let their animals (camels, goats, donkeys, horses, and cows) eat grass. They would stay about two months.

If the Arabs had a wedding and it would cause some noise or commotion, they would ask the *umda* for permission. The same was true if they wished to use the land in other ways. Since these people were just guests, we gave them such permission. [See, *they would ask (seek) permission*].

And when there were weddings and holidays, the Arabs would invite the *umda* and sheiks to take part. Although the *umd*as and sheiks attended such events, the villagers usually did not because the Arabs often created problems among themselves, and the villagers did not want to get involved.

Two years after al-Bashir [Omar al-Bashir, the current president of Sudan] came to power [in 1989, following a *coup d'état*], the relationship worsened. That was 1991. At that time, the Arabs began to carry weapons. When they got the weapons, some Arabs began to shoot at us in order to steal our donkeys and cows.

In the early 1990s, many villages were attacked in our area: Hashaba, Andita, Migmerai, Leberi. These attacks were by Arabs and GoS troops. They would steal our animals, and when we ran out after them, they would shoot at us. While we had once been friends, such problems were created by Omar Bashir. Omar Bashir has a plan; he wants to kill all black Africans in Darfur. Instead of having black Africans on the land, he wants to replace them with Arabs headed by the Arab Gathering.

The Arab Gathering is an organization created by Egypt, Libya, Tunis, Algeria, Saudi Arabia, Iraq, Iran, Syria, and Sudan, and its goal is to create an all-Arab area with all-Arab power and to replace all people who are not Arabs. Also included in the organization are Palestinians, Jordanians, and others—all Arabs.

In fact, if you go and see some of the Arabs or soldiers who died in the fighting with us, you would see long straight hair in the back; it's not African hair.

Khartoum has contact with Arab leaders—and with those in Darfur, of course—and informed them that the Arabs could take any land they want, shoot people, steal animals. In fact, Khartoum has funds for them at the local level. An Arab leader will go to Khartoum and meet with the government and come back and meet with their people to spread the word about how to deal with black Africans.

In Darfur, the government does not build schools. In Darfur, we build our own schools, made from grass and mud and trees, and we help our

children to study. We have helped some of our young people attend the university in Khartoum. But when they studied and then completed their studies at the university, they were told they would not receive their diplomas until they joined the military and went to the south to fight.¹ Many did this, and were killed there. Many of our most educated were killed in the south, and Darfur has been denied their intelligence and expertise.

During the rainy season, the government does not give us any help. We farm and grow sorghum, millet, groundnuts [peanuts], tomatoes, sesame seeds, okra, and then during harvest the government comes and taxes us severely for the produce we have grown.

Our drinking water and water for the animals we drank directly from the well, and the water was not treated and was dirty. And people got sick from it—they had problems with their [urinary tract] systems, and suffered from dysentery, and even more serious illnesses. And the children often came down with severe diarrhea, and that killed many of them. If the Sudanese government was really concerned about the health of the people, it should have sent experts to treat the water.

And in our villages we had no mosquito nets. We built shelters such as this [a lean-to with a roof made of sticks woven together with dried grass], and then we slept in the open and were attacked by mosquitoes. People frequently became ill with malaria and when they did they got a terrible, burning fever, would vomit, and lost their appetite. And we don't have any hospitals to care for us. And if you can't treat the malaria, it advances to more serious problems such as meningitis and jaundice. The government doesn't provide any assistance, no protection; they don't even care.

Also, the government does nothing for us in the way of roads. For example, in El Geneina, which is a very old town, more than 100 years old, only after they chased us [the black Africans] all out did they build a bridge over Wadi Kaja, which is a very big *wadi*. It was absolutely impossible to go to Geneina during the rainy season because the *wadi* was full. The only way we could get into El Geneina was to bring four large petroleum barrels, lash them together, get on top, and then be pulled by two men and pushed by four men. Only seven people [at a time] could cross at once that way.

In the mid-1990s, among the villages in our area that were attacked by the Arabs and GoS were Kudumoulla, Habila (a small village, not the town), and Beida. Many other attacks were carried out in the 1990s, but I cannot recall if they were in the early 1990s, the mid-1990s, or the later 1990s.

In the late 1990s, those villages that were attacked were: Dara, Kombi, Jasheke, Dogayat, Agume, Kukumanda, Assorai, Seretia, Ajelja, Dosdongosa.

¹ In southern Sudan, where the Government of Sudan fought a civil war against Christian and animist peoples over a twenty-plus-year period from 1983 to 2005. An estimated two million people were killed during the course of the war.

In 2000, there were no attacks on the villages. But at that time there was, initially, a lot of theft of animals—camels, cows, and horses; and they [the Arabs] began stealing from people who were returning to their villages from the *suq*. They [the attackers] would tell the villagers [the black Africans] that if they refused to give up their valuables, they would kill them. The vandals were those Arabs who had been trained by the military and been given horses and camels.² When such an incident took place, we'd report it to the police. The police would say, "You must be patient. We brought these people here to serve as police, and you must be patient and wait until we organize them." In other words, they did nothing.

In 2002, we, the villagers, were digging a very deep hole [a reservoir] so as to keep water. The government officials told us, "This is a good idea," and periodically brought us a little food as we were working. It took us four months to dig it because the earth was very hard and stony, and you could not dig too far down. When we finished, it was twenty meters around and ten meters deep. And when we finished, the government officials said that they had another idea: "We should bring a water pump for you so you can pump water and not have to carry it." But as it turned out, the water pumps were for the *Janjaweed* and not us. If the *Janjaweed* were there getting water, we could not obtain water. Each village was also charged four million Sudanese pounds for the water pump and its use, and then the *Janjaweed* took the pump over. If anyone tried to get water when the *Janjaweed* was there, they [the *Janjaweed*] would fight you.

Also, in 2002—I am not sure of the month—we were officially told by the officials of the government that if we had any complaints, we could not go and report them. No reason was given why this was to be the case. We were told, "This is the decision of the government. And even if someone is shot in front of you, you should not go and report it." There was nothing we could do about this. Even if the *umda* went to protest this decision, he would have been arrested.

After that, we, the villagers, began to talk about what we should do. We decided that we should sell all of the animals we had because we figured they would be stolen anyhow. But when we took them to the *suq*, no one would buy them from us. Our own people don't purchase animals since most have all of the animals they need. And the others [the Arabs] wouldn't buy them because they wanted to steal them from us. This was during the summer, during the rainy season, and next 2003 came.

In the beginning of the rainy season, the *Janjaweed* entered our village and told us, "Don't plant this year because if you plant, you will not eat it." They said, "This land is for Arab Gathering, so don't plant." We knew the Arab Gathering was supported by Iraq because if some people were shot by a bullet, you could take out the bullet and it said "Saddam Hussein."

² This is a direct reference to the so-called *Janjaweed*.

We also saw many Sudanese airplanes flying into El Geneina and letting out Sudanese soldiers from Khartoum. When we asked why all these soldiers—there were thousands of them—were flying in, we were told they were for our protection.

Also during the rainy season, the *Janjaweed* brought their animals to our land. For example, they brought up to forty camels protected by about 100 *Janjaweed* and GoS soldiers. The animals—camels, goats, cows, horses, donkeys—would eat every single new plant that was coming up. They were doing this—bringing these animals to our farms—to destroy all of the plants so we would kill the Arabs and soldiers. This, then, would give them a reason to attack us.

They even came to where we stored our food and inside our houses. And if we said anything at all, they would say, “Don’t talk to us, talk to this gun.”

We only have spears and sticks, and if we attacked one Arab they would shoot in the air and the others would come running with their weapons and kill anyone they wanted. In fact, once in a while someone did attack a *Janjaweed* with a spear, but it was suicidal, as he would always be killed.

Each morning a helicopter gunship would roam about the village to check on the soldiers’ situation on the ground but not attack. At this time, the soldiers prevented people from going village to village. But the soldiers killed people wherever they wanted to and no one could do anything about it because the government’s policies allowed for it to happen.

One day I was on my farm during harvest time, and about 150 *Janjaweed* came onto my farm and [one] told me, “Today, we are going to destroy your village,” and I said, “Why are you going to kill my people?” and he said, “Because your people killed my camel.” The *Janjaweed* killed their own camel, and this was just the reason they were using to attack us. I asked, “Who is responsible [among the *Janjaweed* to speak for them]?” Someone was pointed out, and I spoke with him, and said: “We have babies, small children, and women in the village, so we should give you something instead of you attacking our village.” We then sat down and talked about this, and as we did, both soldiers and the *Janjaweed* surrounded me. In the end, I gave him, of my own, four million Sudanese pounds [approximately \$1,600.00; a vast amount of money for that area of the world]. They said, “Okay, but tomorrow you should not be here.”

The *umda* went to see the Wāli (the governor of the area, who was located about four hours by foot from the village) and told him that we could not live in the area when people come to threaten us like that. The Wāli told him, “You have no power. This is our business, don’t interfere.” The Wāli also said that he didn’t recognize the power of the *umda* [that is, the position or prestige of the *umda*]. The *umda* returned to our people, gathered us together, and told us that the government brought everyone and everything from Khartoum—soldiers, weapons, tanks, and planes—and that

they want to kill us. The *umda* told us, all of the people, to gather all of our animals and cross the border into Chad. Some people said, "No, we won't leave our land!" Others said, "If the government wants to kill us, let them kill us." So, some people took their animals across the border to Chad [so they couldn't be stolen by the *Janjaweed* and GoS troops] and came back; others stayed in Chad with their animals.

I remained in my village. The next morning, the *Janjaweed* and soldiers returned. In the village I was not only sheik, but also head of the council of fathers with schoolchildren. Since I was responsible for overseeing the teachers in the villages, I went out that night [the night prior to the expected attack] with others and collected the teachers, telling them that we were about to be attacked and we needed to take them to their own villages so they would be safe. After we accompanied them to their villages, they then fled on their own to Geneina. We returned late at night to our village. Since we knew the attack was going to take place, we took our prayer beads and asked God to save us from this attack. We stayed up all night asking God to save us.

The first attack took place in Jandita at 7:30 in the morning. Jandita is a five-hour walk from our village. We could hear the sound of shooting and see the smoke.

The following day I went to the *suq* and arrived at about eleven o'clock in the morning. As people were coming into the *suq* for the day, some saw the *Janjaweed* in the *wadi* and told others that today was not a good day to trade and that it was better to disperse. But, as a people, we decided to stay. We stayed for two hours, and then my father-in-law and I went to the well to get water for our animals, two horses and three donkeys.

There was a woman in a garden crying, but I could not see her, so I climbed up to a higher place to see the woman, but what I noticed right away, in the distance, were camels, horses, and soldiers all surrounding the *suq*. In my mind, I said, "No one is going to escape from this *suq*!" There were about 800 soldiers and *Janjaweed* on camels and horses and Land Cruisers. Many Land Cruisers, behind the camels and horses, but I am not sure how many Land Cruisers there were.

At 2:30 in the afternoon, the attack began, and as they rode in they began shooting at people. And as they did, they made a lot of noise, *krouking*, shouting, and saying "Antonovs over your head!" and "Omar Bashir is with us!" and "Nuba cannot escape!" and "In this area we will only leave trees!"

Shooting was everywhere, rifles and RPGs [rocket-propelled grenades]. People were praying in the mosque, and they [the attackers] killed more than twenty of them.

My father-in-law and I went down below into the heart of the *suq* [both men were already within the *suq*], and we hid in a small *wadi* within the *suq*. From there I could see much of the attack. The attackers were using machine guns inside the *suq*. As the attack continued, you couldn't see

much because of the dust and the smoke from all of the different weapons being fired. What I could see was the *Janjaweed* and soldiers running through the *suq* shouting, screaming, and killing. As they passed dead bodies, they kicked them with their boots. Many of the people who were still alive pretended to be dead so the attackers wouldn't know who was and wasn't alive. But the attackers also hit the "dead" with sticks to make sure they were dead. When they realized someone was alive, then they shot and killed them. The whole time, the machine guns, Kalashes [Kalashnikovs], and other weapons were being fired and the attackers were screaming and the people were crying.

Some people have sticks [to fight with] and some people have God [praying], and I was praying. This lasted from 2:30 in the afternoon until 4:00 in the evening.

In the *suq* is a very big tree, and inside it is hollowed out. A woman, out of fear, entered the [hollow of the] tree. When that attack was over, she couldn't get out. And she had a baby on her back. We had to pull and push and pull to get them out.

There were fifty-seven people killed in the massacre, and four others died in the hospital afterwards. So, in total there were sixty-one dead.

Soon after this, many people fled to Chad. We left two months after the massacre. We decided to leave, finally, because the attacks continued, and when it appeared they would not end, we left. When I left, only seven people were left. They refused to leave and said, "We'll die in our land."

We first entered Chad at Windalo. It took five hours on foot to reach Windalo. I traveled with my wife, my seven children (between the ages of two and ten years), and my mother. Our village was attacked again after we left for Chad. As I said, only seven people out of 1,000 were left in the village when it was attacked. Those seven people who were left were taken to the cemetery by the *Janjaweed* and told, "We're going to kill you here and leave you." But one of the attackers said, "These are all old people, don't waste your time killing them." So, they were released and made their way to Chad. Our village was burned down at that time. No one has gone back. When you escape from death, what is the point of going back? Would you return to such a place?

We were in Windalo for three months. We were allowed to camp outside the village there. We came to Farchana [refugee camp] on January 17, 2004. We were given a small plot of land and one tent, and we built a lean-to and a cooking area.

Life is very difficult here [in Farchana]. You have no freedom to go outside this camp. And the food they give you is not enough. And there is no work.

There is continual hunger here; you are hungry all of the time. They give us 12.75 kilos of wheat and sometimes sorghum for one month. From

these kilos you must sell some kilos to buy meat, clothes, and other necessities. You must also take the wheat to the mill and pay to have it milled. And people with skills, such as carpentry, have no place to work and no materials to build anything with; and even if you get materials, there is no one to buy the products. And 95 percent of the people are farmers and have no land to farm.

The people who read interviews like this and books such as yours know but do nothing. The situation is hopeless.

The interviewee (name has been deleted for the sake of confidentiality) was born in Abou Ajoura, South Darfur on January 1, 1984. He is Fur. He has fourteen years of schooling, including two years at the University of Khartoum, where he studied engineering.

The interview was conducted by Samuel Totten over the course of two days: December 9 and 10, 2009. Hussein Idriss served as the translator. The interview was conducted in a room located at the Hotel Chez Wu in N'djamena, Chad. During the course of the first interview the interviewee appeared in a white jalabiya (a long flowing robe) and wore a small round cap and sandals. During the second interview, he appeared in western clothes: a pair of slacks, a dress shirt, and leather shoes with long pointed tips, which is the preferred style in various parts of Africa.

I have been in N'djamena for about one and a half years. I arrived on April 8, 2008. My family, my parents and five sisters, are still in Darfur. They are all in Kalma Refugee Camp in Darfur.

I was very young when my village, Bare, was attacked in 1987. I was only three years old. I remember very little. What I do remember seeing, though, are houses being burned down and blood covering people. Many people were running, and I heard the firing of automatic weapons. I also remember the police came on a truck, and they had on green uniforms and they wore red bands around their heads.

In our family [at the time], we had five children and one donkey, which my mother was leading [away from the attack; the interviewee's father was not in the village at the time of the attack but in another village], and we all left with lots of other people. We went to a big *wadi* and stayed under some trees. All of the trees around the *wadi* were full of people. That's all I remember. But later, when I was older, I was told more about the attack. I cannot tell you how old I was when I first heard more about it, but every time people spoke about the attack I learned a little more.

What happened exactly is that there was a group of Arabs from Salamat [who were nomadic] and Targam tribes [who were sedentary]. There were problems between our tribe, the Fur, and the Salamat. The Salamat tribe came across a member of our tribe and killed him. The Fur man had a farm, and the Salamat brought their cows, camels, and goats onto his farm, and the Fur man asked them to leave, and they killed him. This was

not free [pasture] land they let the animals graze on, but farmland, and the animals were destroying it. The man was shot and killed. The Fur went to the police, and the police arrested the killer.

Later, the Fur and Salamat decided to go to the prison to get the man out in order to solve the problem between them, but when they had the meeting, after getting the man out of jail, the groups did not agree. Actually, what happened is once they, the Salamat, got their brother out of jail, they wanted him to go free, but the Fur did not agree. So, the Fur decided that the murderer must be brought to justice, before a judge (who was from the Targam tribe) in Nyala. So, the Fur went to the police and insisted that the killer be brought to Nyala. So the police arrested him and took him to Nyala, but the judge freed him, saying that the man was innocent. The judge even refused to let the victim's family talk, and just released the man. So there was no real justice.

The man who was freed came to our village with a group of Salamat and Targandour, and stole animals from our village. When they took the animals, about 400 cows, four of our people followed them to get the animals back, and there was a battle. Seven of the attackers were killed, five Targandour and two Salamat. And from the Fur, two were killed. The other Fur brought back the animals.

After seven days, the Targam and Salamat attacked our village [again], and that's when we all fled to the *wadi*. It was a big attack, but the number of attackers I can't say. They came from three villages. They were not less than 300. They attacked on camels and horses. They burned down the village and attacked people. Many of our people were killed—about eighteen—and about twenty were injured, and that included women and children.

Everyone fled from the village because the village was completely destroyed. Later, the attackers came back to the village with their wives, and they stole everything.

For three days we stayed in the *wadi*, and then a member of our family who lived in Abou Ajoura took us there, and then we contacted our father. When our father came to Abou Ajoura he purchased a small hut and put us there. It was not [big] enough [for everyone], so we built other shelters—three shelters—to live in. The shelters were made of tree limbs and cane of sorghum. It's not good to live in, but it's what we had.

Some people went back to the village because the harvest had not been completed. Seven people, including my uncle, were killed as they tried to complete the harvest. So, it was decided it was too dangerous to go back to the village, and no one has gone back until now [December 2009].

It was very difficult living in Abou Ajoura. We had lost everything, and it was very difficult to start over. For ten years it was very, very difficult. Then, in 1997, we purchased some farmland and got a good harvest and the situation began to improve.

There were no attacks again until 2003. I should mention, though, I came across *The Black Book*³ in 2003. At that time, I belonged to the student union in Abou Ajoura, at the secondary level, and I was financial secretary. We had a meeting with some students from Khartoum, from different universities in Khartoum, and they brought some books to the library in Abou Ajoura, and among them was *The Black Book*.

They [the students from Khartoum] didn't mention *The Black Book*, but as I was going through the books I looked at the titles and quickly looked over the introductions. The introduction to *The Black Book* caught my attention, and I brought it home with me. It talked about the black [African] tribes [in Darfur] and their relationship with Khartoum, and that interested me greatly. I was only able to keep the book one day because I had to return it to the library so it could be catalogued, and [thus] I only read a small bit of it. When I returned it to the library, another student saw it and checked it out. A police officer, for some reason, was visiting that person's [student's] house, and when he saw *The Black Book* he said it was forbidden to have that book in school or anywhere else and took the book with him. The student reported to the librarian that the policeman took the book, and the librarian told the student union, and the student union formed a committee and went to the police to get the book back. The police, though, refused to return the book. The police said they had been given orders that no one was to be allowed to read *The Black Book*. After the police refused our request, we asked the students who brought us the book to bring us another copy, but they said they were very difficult to locate and could not get us another one. We were very sorry to lose this book.

On 6 of June, 2003, Abou Ajoura was attacked by a group of *Janjaweed*. The attack came at five o'clock in the morning. I was sleeping, but I woke up to the sound of weapons—Kalashnikovs, RPGs, and GEMs. I stood up and looked in the direction of the sound of the weapons and saw the *Janjaweed* on horses and camels, about two kilometers away. About 500 *Janjaweed*. I saw them attacking the houses. As they did, they made *krourouk* [an eerie, high-pitched, intimidating sound]. We didn't move from our home. There was no place to go, even if you wanted to run away.

³ *The Black Book: Imbalance of Power and Wealth in the Sudan*, commonly referred as *The Black Book*, was written and distributed in May 2000, by the Justice and Equality Movement (JEM). In it, the authors assert that the al-Bashir regime (Khartoum) is inherently unfair in its treatment of the people of Darfur (and, in fact, all of the people of the peripheries, or outside the riverine area of Khartoum), and details the disenfranchisement of the black Africans of Darfur. It calls on the government to respond to the critique and provide opportunities for the black Africans of Darfur to have fair representation in the Sudanese Parliament and to provide more roads, bridges, schools, hospitals, etc. Initially, *The Black Book* was published anonymously. When the requests went unheeded, the rebel groups began its attack on government installations in the Darfur region.

The attack lasted for five hours. About one kilo from the attack was a police station, and the police did nothing. Nothing at all. Didn't even leave the station.

After the *Janjaweed* looted all they wanted, they passed through the town and our area and then went away. There were men in khaki with them—about fifty or sixty, and they, too, were carrying looted items. I think they may have belonged to the army, but I'm not sure. They, too, had weapons: Kalashnikovs, RPGs, and GEMs. They looted the most precious items—gold, sugar, and beds—and the part of the town they attacked was where most of the animals were kept, and they stole all of the animals—400 to 500 cows. At this time, they did not burn the homes. They killed seventeen people, and about twenty were injured. And three children [two girls and one boy—five, seven, and nine years] from two different families were lost, and nobody knows what happened to them. People looked everywhere and did not find their bodies, so they were not killed there.

When they [the attackers] were passing through the town, they saw two people, and they killed them. They were two of the seventeen killed. The father of my friend was killed, and my friend was injured. My friend was shot in the stomach, and his intestines were hanging out from the wound. It would not be good to mention my friend's name or the name of his father because my friend still lives in Sudan.

Six days later, I joined the National Service, military training, which every male [in Sudan] is obligated to do after graduating from high school. It was held at an army base in Nyala. We were trained for forty-five days. I was forced to join a group of people called the Dababine. The Dababine is a special group that goes to battle in war. Originally, it was voluntary, but in my case I was forced to go. There are two groups that make up the Dababine—those who support the National Congress and want to fight and give their lives for the National Congress, and those who don't support the government. Both go, the volunteers and those who are forced against their will. Those who don't support the government are sent as punishment. When you go to fight with the Dababine and serve six months, you are released from National Service, which is usually one year long, and, if one wants, one can study free at any university in Sudan.

I served for six months in the Dababine. When I was taken to the south, there were already negotiations between the government and the SPLM [Sudanese People's Liberation Movement], so there was no need to fight. Because I was trained in first aid, I worked as a medic for the army, and that was in the Jabalin.

At the beginning of 2004, in February, I returned to Abou Ajoura. I remained there until March. On 25 March, there was an attack on Abu Ajoura by the GoS and the *Janjaweed*. The attack began at six o'clock in the morning. I was asleep when the attack started, but awoke at the sound of the shooting. This time there were not only Kalashnikovs, GEMs, and

RPGs, but *doskas*, which the police and the *Jesh* were operating. Shooting was everywhere, even at our house.

The first two hours of the attack were very intense, and then it stopped. But later, throughout the day, you'd hear the sound of weapons in different parts of town, and it went on until evening.

Among us there were living Salamat and Targam and other Arab groups, and all of these put up two flags—one white and one green—to signal that they were the house of Arabs. None of these houses were attacked. When the black Africans saw that those with the green and white flags did not have their houses burned down, we began raising flags with those colors, too. But those people [Arabs] who had flags up, they had weapons and they attacked us, the black Africans. The family right across from us who were Arab and had put up the two flags, they, the men, pulled out weapons, Kalashes [Kalashnikovs], and attacked us. They shot at our house but didn't try to come in after us. But our home was made of mud bricks, and the bullets came through the wall. A cousin, a man, thirty-three, who was in our house was shot. He was hit in the shoulder.

As the shooting continued, we, me and my family members, rushed from one room to another trying to get away from the bullets. Some of my older brothers snuck out of our home to go see our sheik about the attacks. Then they went with him to see another sheik, and then they all went to the head of all sheiks. My brothers and all the sheiks then went to see Ibrahim Khumni, an important and high level *Janjaweed* leader who is a member of Parliament, even until now, to see why the *Janjaweed* were attacking us. He called the *Janjaweed* leaders together and asked them to stop their fighting and called for a meeting.

Then, on the 26th there were no attacks, but the GoS and *Janjaweed* surrounded the town. Then, on the 27th, there were no attacks, but there was no meeting.

On the 28th, Ibrahim Khumni organized a meeting with the sheiks and the *Janjaweed*. Also there were GoS soldiers and the police. He asked the *Janjaweed*, "Why are you attacking these people?" The *Janjaweed* said, "Three of our people who were killed outside of town." And the soldiers said, "And there is a rebel group inside this town." The people said, "We do not know about any rebels here, and if you know them, go and arrest them."

The *Janjaweed* said, "Three of our people were killed, and you must pay 70 million [135,000 USD] for each of them, and if you don't, then we will kill more of you." The people didn't refuse to pay but said, "Give us time." They didn't have the money but wanted to save lives.

The *Janjaweed* didn't want the money but wanted to move the people from the area. So, some *Janjaweed* left the meeting and went to the police station. They asked the police to go out and shoot their weapons, and then to go to Khumni's house and say that the Fur had killed some people. The police did so, and when they arrived at Khumni's house, the *Janjaweed*

told our people, "You made an agreement and now the Fur broke it and killed some of our people." No one was killed, though.

When this happened, the *Janjaweed* shot two of the sheiks and killed them and began attacking the village again. In the night, the *Janjaweed* forced all of the people to remain in their homes overnight and in the morning they forced all the people—60,000—to a school compound. It was the Alfaroug Primary School. It's a big, big school. All the people were rounded up!

The *Janjaweed* and the *Jesh* began burning down the entire village. As this happened, the police stood by, about 300 meters away. They only burned the areas where Fur, Zagahawa, Massaleit, and Dajo lived. Remember, I said everyone had begun to raise the green and white flags in order to save their houses; well, after the meeting failed and the attacks started again, those Arabs who lived in the area began pointing out all of the houses of the Massaleit, Fur, Zaghawa, and Dajo, so even if they [the latter] had flags up, their homes were still attacked.

Some villagers fled from the school grounds and went to Nyala to spread the news of the attacks—to tell their family members and friends. Then they all hired vehicles to return to the school to carry away their families. But on the way the police stopped all those vehicles owned by black Africans and let all of the vehicles of the Arabs continue on their way. Those Arabs carrying black Africans out to the school compound charged \$30.00 a person—and they charged pregnant women twice the amount—when the usual fare was \$1.50 a person. All the vehicles continued making the round trip between the school compound and Nyala in order to carry everyone out. For my family, it took three days to get them all out. For the rest of the people, I don't know how long it took them to get out.

On the way to Nyala there are villages of *Janjaweed*, and when we, the black Africans, passed through the villages, the *Janjaweed* would force the vehicles to stop and they pulled people out—mainly young men—and beat them. They, the *Janjaweed*, forced those they were beating to repeat "Up is God and down is Bashir" before they would let them go. What they meant was that "God controls the sky and al-Bashir controls the land."

Some members of my family were beaten, but I went on the third, the last, day, and I had been told where people had been beaten, so I told the driver to take a different route. The driver was Arab, but he was looking for money, so he listened to me.

Not everyone stayed in Nyala; rather, they dispersed. While some stayed in Nyala, some went to Khartoum and others went to other towns in the region [in Darfur].

For the first two months after the attacks, we stayed in a place called Sakali. Those two months we did not have a shelter, and so the women took their *tobs* [flowing dresses like Indian saris] and made shelters [lean-tos] to cut the sun and rain. The *Itihati Almarkazi* (a type of police higher than the

regular police but lower than soldiers) destroyed all the shelters made by the women because they claimed it was giving a bad image to Nyala. This happened the entire two months we were there, beginning the first week, so people dispersed again.⁴

Members of our family eventually went to the *suq* to work as shoe cleaners, clothes washers, and in restaurants, and we eventually found a small plot of land to rent. We bought plastic and built a shelter to keep the dirt and rain away.

Around this time, an IDP [internally displaced persons] camp was established in Kalma, and many people began to go there. Our entire family went there in July 2004. You see, in town sometimes you don't make any money and you go to bed hungry and it is difficult, so when the IDP camp opened we went there because you could get food every day, and there was also special care [medical facilities, clothing, and education] for children, and health services for everyone.

I stayed for two months in Kalma. A Sudanese organization, SPCR [Sudan Popular Committee for Relief], which was supported by UNICEF [United Nations Children's Fund], established the camp. The GoS used to arrest young men in the camp, but why, I don't know. The Sudanese government is in a better position to answer that question than me. Members of the Sudanese government, especially the police, and the *Janjaweed*, raped girls and women when they went to fetch firewood. These attacks on the females went on all the time, over and over again, daily! The girls often did not admit they were attacked, but their families could tell something was wrong. It happened—the rapes—so often that UNICEF came in to teach us how to help the girls, to try to ease their psychological distress.

There are two reasons why UNICEF didn't come in [itself] and help all of the females. First, the Government of Sudan is very sensitive about the issue of rape, and it doesn't want to see any organizations involved in this type of work. Second, there is a law in Sudan, which comes from the Minister of Humanitarian Affairs, Ahmed Haroun, that humanitarian organizations that donate funds and goods cannot work directly with displaced people and must go through local and national organizations. And most of these organizations—local and national—are either pro-Sudanese government or do whatever the government says. UNICEF didn't come directly to talk about rape, to say "Since rape is taking place, this is what you should do to help the victims," but said, "if a female is raped, this is what you could do to help her."

⁴Note: The interpreter and the interviewee explained that when the regular police cannot handle a situation, the *Itihati Almarkazi* are called in, and when the *Itihati Almarkazi* cannot handle a situation, the soldiers are called in.

After two months in Kalma, I left for Khartoum. I went to Khartoum to attend university, and I stayed for three semesters and then returned to Kalma. As for my leaving university, the Sudan University for Science and Technology, I left for two reasons. First, my financial situation was difficult; and second, I was concerned about the suffering of my people. As students, we, from Darfur, were treated equally. However, the Sudanese Union, which supported all of the student leagues [organizations], refused to support leagues created by students from Darfur. The students in the Sudanese Union wouldn't even see us, not even recognize us, not even talk to us. So, we received no funding at all from the Union, which is given funds to support leagues. It made life very difficult, and we were made to feel like outsiders.

I returned to Kalma in 2005, and worked with SPCR. It's the organization that established Kalma Camp. I worked with a program called Protecting Children. It provided security for children, helped them to solve problems such as trauma and anxiety, and established a kindergarten for young children. My main work was to organize sports programs for children and to help them with drawing. The children had lots of problems with their heads, their brains, and we had a program where we gave children paper and colored pens and left them to draw what they wanted. This was a project UNICEF had us do.

After they [the children] drew their pictures, we looked at the drawings to see what they had drawn, and we could begin to understand the problems in their brains. The children who created the drawings were from five years to nine years [of age].

The children mainly drew what happened to them during the attacks: the planes dropping fire [bombs]; helicopters shooting bullets; the *Janjaweed* on horses killing people, raping females, and burning villages; soldiers shooting people; police killing people; soldiers in vehicles shooting the people who were fleeing; people gathering in one place and soldiers and police killing them; blood gushing from wounds; the color of the uniforms, the police in blue, the soldiers in green with black [camouflage], the *Janjaweed* with all different colored clothes; pictures of cows, donkeys, and camels, all shot; people running out into the wilderness and on donkeys and camels trying to escape; people running and hiding in *wadis*. After about one year, some children began drawing pictures of the camp and white people [individuals working with nongovernmental organizations] with satellite phones.

After we collected the drawings, UNICEF would pick them up and take them with them. What they did with them, I am not sure.

Around that same time, we, a number of younger and older men, formed an organization to provide literacy training for men and women, carpentry courses for young males, tailoring for young females and males, and health training for young males and females. We also provided training to

help volunteers, men and women, offer psychological assistance to rape victims. At that time there were about 250,000 people in Kalma camp.

After conducting many workshops, we, the organization, Youth for Capacity Building Organization, discovered how many problems rape victims faced, medical and psychological, and we became concerned, so we began holding meetings about rape.

We didn't ask people if they had been raped, but shared information. Victims then approached us, not telling us they had been raped but to begin friendships, and then they gradually shared their fate with us so we could provide help. We gave them psychological support, and told them this [rape] could happen in any society and thus they should not be ashamed. We also provided them with medicine for any diseases they contracted. We received medicines from MSF [Médecins Sans Frontières] and UNPFA [United Nations Population Fund]. If we could not help them, we'd send them to MDM [Médecins du Monde], Red Cross, or Action-Fam, which were also in Kalma camp.

After about three months, we put on an exhibition on rape and we brought together about 5,000 people. We had specialists explain to everybody how rape was not the fault of the females, the dangers of being raped, the diseases that could result from rape, and the psychological problems females who had been raped faced.

We also told the families that the babies born of rape are innocent victims and should not live in shame. Unfortunately, some families still argued that the babies are bastard children and are *Janajweed* babies.

I saw three cases where three females (the oldest was about twenty-five years and the other two were nineteen and seventeen years) who had been raped got pregnant, and the families considered this a shame. Our organization met with the families, explained that the girls did not agree to be impregnated and that it was against their will and not their fault, and there was no shame involved for the girls or the families.

There's always a ritual surrounding birth, the baptism of babies into the Islamic faith and to giving them a name, and we told the family we would pay for the ritual—the soap, tea, sugar, clothes of the child, a blanket, and *tob* for the mother. The *simaya* [similar to a baptism] takes place within seven days of the birth, and the soap is to clean off the aftermath of the child, and the tea and sugar are for the guests.

We, our organization, treated more than 400 girls who had been raped. That was not one percent, we believed, of the actual rapes.

In one case, when Omar al-Bashir visited Nyala, over 105 black African females were raped on that day. That was in 2006. I don't remember the exact month. Lots of *Janajweed* came into greet him [al-Bashir, the president of Sudan], and on their way in they raped girls and women. This number [105] of girls and women were those who were raped only from Kalma camp.

In many camps, girls and women are rejected by their families and pushed out of their villages. For example, I visited one IDP camp called Ottashe in South Darfur, and there I met many girls and women who had been raped and then forced out of their homes and villages. They had to set up a tent away from the village and exist on their own.

I was the director of the Youth for Capacity Building Organization, so I didn't do the psychological counseling myself. I did, though, often visit the rape victims to see how they were doing.

The way I became director is that I was the director of the sports program in Kalma, and when we decided to form the Youth for Capacity Building Organization we needed to obtain permission from the Minister of Humanitarian Affairs, and I volunteered to get the paperwork done. Those in the organization decided since I had the courage to seek such permission from the Sudanese authorities, I should be the director of the organization. So I served as the director from 2005 to 2008.

We, as an organization, saw rape as the reality of our lives and decided to try to solve all the problems caused by it. We knew if those who were raped tried to hide it, it would cause many problems, not just for them but the whole community.

During this time, 2005 to 2008, I am not sure how many *Janjaweed* attacks there were on Kalma, but there were many. A major attack took place, for example, in 2006, in June, I think, but I am not positive.

Inside Kalma camp there were also problems, some with the police. There are about eight police, Sudanese, police stations there. Each station has about thirty policemen. One of the things they did was whenever they went to purchase tea or porridge from the women who had little stands in the camp, they would beat any male IDPs who were there to purchase tea or porridge. Also, at night, the police would go to tents where beautiful girls and women lived, and they would chase away the men [the fathers, brothers, and husbands] and take [have sex with] the girls and women. This happened all the time.

One day, in June, the police went around grabbing young men and cutting their hair off across and over the top, making a cross. Down into the scalp. Some who fought were thrown to the ground and beaten; others just gave in. In some cases, some were injured, had their scalps cut open. The police did this just to intimidate people. They did anything they wanted.

There was a woman who was selling tea and her brother was sitting next to her, and the police tried to chase the brother away, along with all of the other male IDPs near her. The police started beating the brother, and the brother pulled a knife and stabbed a policeman. The other policemen began shooting in the air, and when the rest of the people in the camp found out what happened, they began beating all of the policemen in the camp, at all of the police stations in the camp. The policemen fought back

and injured about twenty people, and killed three. Finally, the police were forced out of the camps as the people beat them.

The police asked their headquarters for help, and they were sent about eighty Toyota Land Cruisers filled with police. There were about ten police in each one; not less than 800 arrived at Kalma camp. When they arrived, many people, about 100,000, blocked their way and screamed that they could not go inside the camp. The police began shooting in the air over the people's heads. For three hours they continued to shoot, but the people refused to move. After about three hours, the police shot directly into the people, killing and injuring some, but the people still refused the police entry.

Finally, the African Union intervened, about sixty African Union soldiers. They didn't come to confront the police but to convene a meeting with the sheiks and young men. I was present at that meeting. They proposed that the police should be allowed in the camp, but those policemen who created the problem should be judged. The displaced people refused to accept this proposal.

The African Union then went to see the Wāli, the governor, of South Darfur. The Wāli insisted that all the police be allowed in the camp. But the African Union said, "No, the police should leave the camp for a week, and the people who blocked the police should go back into the camp for one week." They said that they, the African Union, would resume negotiations in one week's time. The Wāli accepted this proposal and withdrew the police.

After one week, the African Union returned and picked up the sheiks and some of the youths—and I was one of them—and took us to the headquarters of the African Union in Nyala. After a discussion of about three hours' time, we failed to come to an agreement. The Wāli, the GoS troops, the police, and the members of the National Security Force said they wanted to have their own meeting for thirty minutes. When they returned, they said, "We must enter our troops inside the camp."

We said, "No!"

They said, "There are rebels inside the camp, and we must enter. They want to attack our airport and Nyala itself. If you disagree, don't ask us what might happen to you in the future."

Then we said, "This is not the first time for the government to beat us and kill us. Remember, it was the government and the *Janjaweed* who attacked our villages and killed us and chased us here. And now we have nowhere to go. You, the African Union, know we are in danger, and it is your responsibility to protect us. And now we are going back to our people in the camp."

We then went back to our people in the camp, and the police did not return to the camp but blocked roads between Kalma and Nyala. Then they began arresting young men, and if there were any goods coming from

Nyala, such as oil, sugar, salt, they blocked it from entering the camp. And they prevented the international organizations serving Kalma camp from entering for four weeks. At this time, many visitors from many countries (the U.S., Italy, the UK, France) and the UN began to visit Kalma camp. The sheiks and the youth committee made a meeting with the visitors about what was going on in the camps, and told them the situation was not good. They also made meetings with others, such as government officials and the police, in other areas. After all the meetings, the government agreed that it could not send the police inside the camps, and the eight police stations were removed. So, up until now, there are no police in the camp, and Kalma is under the control of the sheiks.

Until now, the police are based at the entrance to Kalma camp, but not inside. Some of these police used to be *Janjaweed* who now wear police uniforms. We know these people [the “former *Janjaweed*”] because they are from the region, the same area as us, and we know they were in the *Janjaweed*. They still act like *Janjaweed*, the same behavior. They make threats, they beat people. You can see they are the same, and that they are untrained. The people all the time tell the African Union that the *Janjaweed* have become policemen, but they don’t do anything. The African Union is not helpful! All the time incidents take place in front of them, and they do nothing.

When incidents take place in front of the African Union and they do nothing, IDPs sometimes ask them, “Why did you do nothing?” and they always answer, “We are not here to protect people. We are a peacekeeping force.”

In late 2007, there was a problem among the displaced peoples themselves. After Minni Minawi⁵ signed an agreement with the Sudanese government, some of his armed soldiers entered Kalma camp. The Sudanese saw these weapons inside the camp and believed that rebels were inside the camp [which was, in fact, now true], and they began threatening the displaced peoples.

The soldiers of Minni came to the camp because they had members of their family there. There was another group that didn’t support Minni, and they did not support the [peace] agreement (signed by Minni Minawi and the government) the Darfur Peace Agreement, and they said that the soldiers [rebels] should leave the camp. Family members of Minni’s men said, “Now that we are at peace with the government, our relatives who were rebels should be able to remain and the government should also be allowed to enter the camp.” So now there was a division in the camp. All the people who supported the peace agreement and Minni were moved to one section of the camp. Those soldiers with Minni started going to the

⁵ The military leader of the Sudan Liberation Army (SLA), which was once one of the largest rebel groups engaged in battle with the Sudanese government over the latter’s treatment of the black Africans in Darfur.

shops of those people who didn't support the peace and took items by force from the shops. They robbed their own people!

One night two rebels went to a shop and ordered the owner to give them all of his money, five million Sudanese pounds, and when he didn't they shot him five times in the stomach and then ran away. When the people came to help the injured man who was dying, he said, "I know the attackers, one is Zaghawa and one is Massaleit. Go and get the money from them and give the money to my children." The man died about three hours after being shot.

The displaced people went to the family of the men and to their commander and said, "We want that money back." They refused to give the money back, and when the IDPs started to leave, the men [the rebel soldiers/thieves] began shooting at the people. In the morning, the IDPs reported the incident to the African Union. The African Union entered the camp to speak to the two rebels, but they refused to see the African Union. The family members of the victim bought weapons and began carrying them around inside the camp, openly, like the rebel soldiers. They then attacked Minni's soldiers, and for three days there was fighting. Other people joined the family members and they became a huge group, more than 300. Even those without weapons, only sticks, wanted to fight. There were about 100 to 150 of Minni's soldiers. More than 100 people died in that battle.

About 20,000 people were displaced, again, during that battle, and went to live about seven kilometers away [from Kalma camp]. Our organization, the one I was director of, went, along with UNFPA, to assist these people. They went to an area with no shelter, no water, no food, nothing.

Immediately, the government sent police out to the area of the newly displaced, and the police beat the people, telling them they had to leave the region, the state, altogether. When UNFPA tried to [intercede], the government ended up expelling the director of UNFPA from Sudan. The director was not taken away [by the police], but ordered to leave within twenty-four hours, which he did.

The group that was displaced was divided into groups, and one was sent to Ottashe, in South Darfur, and one to Salam, also in South Darfur. The people who were not sent to these camps had their food cards [issued by World Vision] taken away by the Sudanese authorities and were promised land in Nyala. They were given land, but it was too far away from anything, with no services and no water.

The rebel group left, but the group who fought them kept their weapons. The money was never recovered. I do not know if the two men who murdered the man were ever caught and judged.

One month after the battle, I returned to Khartoum. Originally, I went to attend a conference, but I also went to open a branch of our organization in Khartoum. But I was not able to open the branch because the Sudanese government threatened me. While in Khartoum, two months

after my arrival, I received a telephone call from the Director of the Sudanese Humanitarian Aid Commission, Kahlid, and he told me to go to the National Congress to receive 60 million Sudanese pounds and a plane full of aid and to deliver it to displaced peoples in Darfur. I told him that I knew that if the Sudanese government gives anybody anything, it means the Sudanese government wants something in return. I also told him I didn't want [to take on] any obligations. And then the director told me, "Your value is one bullet. If I find you anywhere, your value is one bullet. We now know that you are a rebel and support rebels." I knew others who had been threatened like that and had been killed.

I collected my luggage, traveled to Darfur, Nyala, in a big lorry as an assistant to the driver, and came directly to Chad. This was 16 March 2008.

I first arrived at Am Jerema [in southern Chad]. I traveled from Nyala to Chad in various vehicles as an assistant to the drivers and not as a passenger so no one would ask me, "Where do you go?" It took me one month to reach N'djamena. Before, though, I went to Goz Beida [a refugee camp in southern Chad, along the Chad/Sudan border] and found many people from my tribe, and so I stayed there twenty days. While there, I talked with the teachers and sometimes I taught in the school. I taught mathematics and the Arabic language.

I left Goz Beida because I had already lived in a camp, Kalma, and I knew what it was like, and I knew I did not want to stay and waste my time. So I left in order to finish my education.

I arrived in N'djamena on 8 April 2008. Because [Chadian] rebels attacked and tried to take over the government in N'djamena, people said anyone from Sudan should be arrested. I went immediately to CNAR [Committee National Pour Accueillir Le Réfugiés], and asked for refugee status. The people at CNAR interviewed me, and they asked me to return to the refugees' camps in the east [Eastern Chad]. I told them I didn't want to return to the refugees' camps because I wanted to complete my education, which was the most important thing, and asked them to give me papers that would protect me [from being arrested as an illegal alien], but they refused.

After two months I decided to go to Europe, and I contacted a friend, and his brother gave me the number of someone in Russia. So I sent my passport and papers to that person in Russia, and he sent me an admission to a university. But I couldn't go there because it is too expensive. Still, I wanted to immigrate to Europe, so I got the visa to Russia and bought a ticket in N'djamena to Tripoli that flew on to Brussels and then Moscow, but I planned to remain in Brussels. But at that time the relations between Sudan and Chad were very bad, and my passport had no visa to be in Chad. So I gave an official in Chad corruption [a bribe] so that he would give me a departure visa, and I traveled on 9 October 2008 to Tripoli. When I arrived in Tripoli the officials asked where my transit visa to Brussels was, but I didn't have one, only a transit visa to Moscow.

When I failed to produce that transit visa to Brussels, the Libyans sent me back to Chad.

All my papers were seized by the security officer on the plane and were turned over to Chadian authorities once we landed in Chad. The security man told me that the relations with Chad and Sudan were very bad, and so he told me, "Let's go to the police station in N'djamena, and there we can register your name as a foreigner and we can give you back your papers." But when we arrived at the police station at three o'clock in the afternoon, the workers had stopped working already. We found the director, and he told his agents, "Put him in jail until the morning." In the morning, the interviewer asked me how I had entered Chad and then told me to bring a person who knows me [and would vouch for him]. I called one guy I knew, Yousef, and he came down. Yousef obtained a form and filled it out, and then an assistant director arrived and he remembered Yousef because he had had a problem [previously] with Yousef. He [the assistant director] said, "Both of these guys are Sudanese." The director said, "Don't talk about papers; put these guys in separate cells." The director then said to us, "You two are collaborators with the Sudanese government and are passing information to Sudan about Chad."

I remained in prison for one month, but Yousef's family members came and proved that he was Chadian, not Sudanese, so he got out. It took Yousef one month to get out. But me, I was moved to another prison under the ground. It's called R.G., and I was there for another month. I got sick [problems resulting in his not being able to eat].

I tried to make one of the guards a friend so I could get a phone call. And that worked. I called a friend and asked him to give me the number of UNHCR [United Nations High Commissioner for Refugees]. An official from UNHCR came to see me at the prison and asked what had happened to me, and after one week I was released. After one month I got better and then returned to CNAR. I told them I was traveling, and I asked them, again, for papers to protect me, and they said, "No, we have no papers like that." So, like that I was forced back to the Chadian government. They seized my passport and told me, "Go away from here."

I left there [the office], and contacted the SLA [Sudanese Liberation Army, a major rebel group fighting in Darfur] and told them that my passport had been seized, and asked them to go to the Chadian authorities and get the passport from the Chadian police. The police gave them the passport, but on the condition that they don't want to see me again. This was just two months ago in October 2009. If they see me again, they will put me in prison forever. So now I have changed my name. This was last month, in November. It is no longer Saliah, it is Hassan Adam Diar, and I got a Chadian ID card in that name. I did this for my protection.

My plan is to leave Chad as soon as possible. They [the Chadian authorities] may not recognize my name, but they could recognize my face, and if they do I could end up in prison again.

As for the international response to the crisis in Darfur, I see it from two perspectives: one positive, one negative. The international community has made some resolutions about Darfur, and this is the most positive point. Through the resolutions they've notified the world that Sudan has committed serious human rights abuses. The resolutions force Sudan to be cautious in its dealing with Darfur. Before, it had an open hand and felt that it could treat the people any way it wanted.

The other positive aspect of the resolutions by the international community is that it gives the survivors hope that they will get their rights in the end and that prosecuting the criminals will bring justice.

The negative aspect is that when any resolutions come out from the international community, the Sudanese government reacts by detaining and killing more leaders of the displaced [black African] people. The government also reduces the services [humanitarian aid] to the refugees. The GoS complicates the process for those NGOs and humanitarian groups that wish to provide services for the IDPs in need. These are the negative aspects.

When the [George W.] Bush Administration and, in particular, [U.S. Secretary of State] Colin Powell described the crisis in Darfur as a genocide, that was very positive at the time. I was actually told of that decision by Andrew Natsios, a U.S. government official, in a meeting in Kalma camp in Darfur. It was one of the times when U.S. officials visited internally displaced people in the IDP camps.

Andrew Natsios mainly said that the U.S. would help the humanitarian groups in Darfur who were helping the refugees. He also said that the U.S. did not like what the GoS was doing in Darfur.

That said, it would have been better if the U.S. had acted to stop the violence instead of giving [referring] this problem to the UN.

I think it is great that the International Criminal Court [ICC] prosecutor requested that a warrant be served on Omar al-Bashir for genocide. That was the right thing to do because al-Bashir committed genocide.

Some people claim that may be counterproductive, but Omar al-Bashir committed all types of crimes in Darfur and is *still* committing crimes, but he cannot do more than what he did.

A warrant for al-Bashir's arrest or not does not matter to al-Bashir because either way he will continue to do harm to people in Darfur. So, as far as I am concerned it's better that such a warrant is issued because it gives the people of Darfur hope, and lets Sudan, and al-Bashir, know that, at least, the world cares somewhat about Darfur.

Salah Hassan Ishak was born on December 2, 1976, at Wadi Salih, West Darfur. He is a Fur. He completed twelve years of education. Prior to seeking refuge in Chad, he and his family had resided in Bendisi, West Darfur.

The interview was conducted by Samuel Totten on December 12, 2009. Hussein Idriss served as the translator. It was conducted in the small, dusty Chadian

village of Goz Beida, outside of which is located a refugee camp for people from Darfur, in a small room at the Oxfam Compound.

Long before the attacks on Bendisi by the *Janjaweed* and GoS soldiers, we experienced armed robbery. There are Arabs who stole our animals. They were actually *Janjaweed*, but people didn't know they were organized. That was in 2001.

Even my own animals were stolen. There were twelve people with eight horses who attacked. They carried Kalashes [Kalashnikovs] and had one GEM called a mangosto. This was in June 2003. Our cows were outside the house, tied up individually. Early in the morning, when the worker working for us was milking the cows, we were attacked. About six o'clock in the morning. The sun was just coming up. When they came, I was awake but still in my bed.

When they came, they came behind the house. They saw the man, twenty-six or twenty-seven years old, milking the cows, and they shot and killed him. There was one customer for milk, a little girl, about nine years, and she was shot and killed. My younger brother, Abdelsalan Hassan Ishak, was in the bathroom in the house, and he was shot, too. They didn't shoot at him, but the bullet came through the wall, and he was killed, too. They were all killed there, where they stood.

My brother was shot high in the chest, and the bullet came out his back. He only screamed once and he was dead. So, we could not speak.

My father was there [in the tukul, a round mud hut with a conical thatched roof], but he was too old and could not run. My mother was there, too, and my two sisters. The husband of one of my sisters had already been killed in 2002 by Arabs.

When they [the attackers] first arrived, as I said, I was in bed, and when I heard the shots I jumped down to the floor on my stomach. On some of the horses were two *Janjaweed*. Those four on the back jumped off the horses and started untying our cows. My room was nearest to where the men attacked, and when I heard the shot and the scream of the little girl, I looked up and saw the men jumping off their horses and going for the cows. They pushed the cows towards Gosir, a village about three kilometers away. Actually, it is a hamlet where all of the people grazed their animals. The thieves stole about forty-two big ones. They left the small ones, seven, that were in a stockade.

In Gosir, they killed twenty-six people, most of them women, children, and old people. They killed them and stole their animals. More than 400 cows. Most of the people killed, I knew them because we lived together. When the *Janjaweed* attacked the hamlet, they began shooting extensively and wildly, firing everywhere, in order to frighten people, and so even if you had weapons, you would be scared and try to escape. As they were shooting, they shot people and into huts, which are made of straw, and the bullets hit people just sitting or standing or hiding.

We buried these people, five to a grave, and only in a few cases did we bury one person in one [a single] grave. Those buried were buried that way because those burying them feared the *Janjaweed* might return and attack again. So they worked fast and buried many in a single grave.

We were not armed, and so if you chased the attackers, who had weapons, you surely were to die. So I didn't follow them, but I got my bicycle and rode to the police and reported what happened—that the *Janjaweed* killed my brother, a worker, and the little girl and stole our animals. That's all I could do.

The police said, "It's not our business to chase down the *Janjaweed*. Our business is only inside the village." The police are black African, but their superior is Arab, and he told me that he had orders not to chase the attackers, the *Janjaweed*. I believe the officer, that he was telling the truth, because many attacks happened like this and no police [ever] went after the attackers.

I don't know why the police had such orders, but I do know that after such attacks the police would go to those who had been attacked, and if the victims had tried to defend themselves with weapons, they [the police] would take [confiscate] the weapons and arrest the owners. The police never tried to halt such attacks or even go to the areas that were under attack, but they had spies in the villages, not in uniforms, and if the spies saw people trying to protect themselves with weapons, they would report them to the police and the police would then go and arrest those who had been reported. So, I think the police were preparing for the attacks by taking the weapons, so when the *Janjaweed* attacked they would find no resistance.

During this period, in 2003, the *Janjaweed* attacked, systematically, all the villages in the area and stole all the animals. You remember, I told you we were left with seven small cows [calves]; well, we moved them to another village, and when that village was attacked, the seven small cows were stolen. So the *Janjaweed* deprived all of the villages in the area of cows.

In August 2003, during the rainy season, I sat for my high school diploma. Because I needed money to travel to Khartoum, because I was going to study at the University of Sudan, and because I told you all of our animals had been stolen, we went to the *suq* to sell cereal (sorghum, dura, okra, and tomatoes, dry ones) and a small donkey. This was Thursday, and the attack came on Friday. I was supposed to travel on Saturday.

On Friday, at ten o'clock in the morning, the *Janjaweed*, with about 300 horses, donkeys, and camels, and four [Toyota] Land Cruisers, with police, attacked. With the police there were two guys: one named Amin Yassif Hussein, a teacher, and Bakhit Nahid Salih, who was working with the Islamic Tax and Customs Authority. Both were Africans. These two men, we know them, but we don't know why they were with the *Janjaweed*. We don't know what the agreement was between them. One of the men was

my teacher, and I trust him, and I believe he was forced to take part. After the attack they put him in prison, for nothing.

The vehicles came first, ahead of the *Janjaweed*. The two men announced to the people in the *suq* that the *Janjaweed* were coming shortly, but that they were not coming to harm anyone. Instead, they were coming to get money and grain from the Islamic Tax Office, so they [the people] should not be scared or get their weapons. They traveled through the market telling throngs of people such news.

When the *Janjaweed* arrived, they divided into three groups. One [group] went directly to the Office of Islamic Tax and the other two groups went to the *suq*. The two that went to the *suq* began shooting, and people did not have time to even close their shops. Everyone just ran for their lives.

The *Janjaweed* looted the *suq* completely. I was at the *suq* to inquire about traveling to Khartoum and to meet with the lorry drivers that drive overland with produce and other goods and take passengers who sit atop of the load. As the *Janjaweed* attacked, they shot their weapons everywhere and without stop. They entered any door, and if a door was locked they shot the locks off. And as they rode in, they shouted and screamed *krourouk* [a high-pitched eerie sound]. They looted all day long. The heavy items, like bags of sugar, they sliced open and tossed them on the ground. The small precious items they put in their pockets.

In the afternoon, eight vehicles, Land Cruisers with *doskas*, appeared, and in one was Ali Koship, a soldier, an officer, but he had no chevrons on [his uniform's sleeves].⁶ I knew Ali Koship well because I studied with his son many years ago. Ali Koship is very notorious; he has killed many, many people. He was head of the *Janjaweed*; even today [he remains in that position], but now he has become [even] bigger.

When he arrived, he collected all of the *Janjaweed* and instructed them to sleep there, within the *suq*. He then went to sleep in the office of the locality.

In the morning, at seven o'clock the following day, Ali Koship gathered all of the *Janjaweed* and ordered them to loot the entire town. He gave them specific orders that after they looted it, they should burn it down.

When they [the *Janjaweed*] first arrived at the village and reached the first house, they put fire on it and burned it down. Most of the houses were made of straw, and this first house was straw. Then they began looting, and as soon as they looted everything in a house they put fire to it, and through the day they continued like this. More than 10,000 houses in the region were destroyed and burned. When one house began burning,

⁶ A high-ranking Janjaweed leader, Ali Koship is wanted by the International Criminal Court (ICC) for over 40 counts of crimes against humanity and war crimes, for directing and taking part in killings, rape, destruction of villages, and forcible displacement of black Africans in West Darfur. During 2003–2004, Koship was the most senior commander in the Wadi Saleh area in West Darfur.

it threw its fire [spread its sparks and flames] on other houses. The straw burned easily and fast.

All of us, the people of Bendisi, fled as the *Janjaweed* looted and put fire to the homes. All the people but the elderly and the disabled fled. The elderly and the disabled were burned alive in their homes.

I have two uncles, one is blind and one has no legs. Miraculously, the blind one is a little bit stronger but could not see, but the man with no legs could see, and when they saw their friends having fire put to them, the blind man picked up the one with no legs and the man with no legs told the blind man where to go and they escaped.

In the beginning, my family all fled together, on foot. But as we ran and came across the *Janjaweed* and passed all of the houses with fire, we dispersed. We know that if the *Janjaweed* saw a man they just kill[ed] him, so we, the men, did not want our families killed, so we left [split off from] them. My father, who I said is elderly, could walk but not run, so my sisters [one thirteen years and one twenty-six years] and a cousin [a female, thirteen or fourteen years] helped him. So he remained with them.

When they [his father, two sisters, and cousin] were leaving the village, the *Janjaweed* halted them and they took my cousin, now my wife, and raped her. My sister could do nothing. They were there and could do nothing. So were my father and mother.

After five days, in another village, I saw my parents and mother and sisters and cousin. They told me how they had been caught by the *Janjaweed* and that the *Janjaweed* had raped my cousin. They said the *Janjaweed* pointed their weapons at them as they [the *Janjaweed*] raped my cousin and did so until they were finished. My sister told me that two or three men raped that girl [his cousin].

That day many, many girls were raped by the *Janjaweed*. The girls were mainly raped when they were fleeing their village.

The biggest problem during those five days was when I was heading to Mukjar. For these five days, we (friends and many others I knew) moved around in the jungle. [When Totten asked the interviewee to describe "the jungle," he said: By jungle, I mean there were extreme trees and high grass and no one could see you. In our area there is no desert.] We could not return to our village or any other villages because they were all destroyed and we could not go to Mukjar because the same *Janjaweed* who destroyed our village went back to Mukjar. We could see them from our hiding place and see that they were moving in the direction of Mukjar. At night we would go to one village where people had found that not all of the cereals had been stolen or destroyed and got some to eat.

The reason we went to Mukjar after five days is that the rebels from Sindo Mountain attacked the *Janjaweed* there and chased out the *Janjaweed* and the government. The rebels then left.

After three days, the government brought hundreds of *Jesh* [soldiers], maybe 500 to 700, to Mukjar, and after their arrival the torture and killing came to Mukjar. One day, the fourth, a helicopter came and on that helicopter was Ahmed Haroun [at that time Haroun was the Vice Minister of Interior; later he was made Minister of Humanitarian Affairs] and following him was Ali Koship. There were many other *Janjaweed* leaders, and they all arrived directly across from the house in which I and others were hiding. I did not know Ahmed Haroun then, but my father did, and he pointed him out to me and told me who he was.

Ahmed Haroun was holding a microphone in his hand in front of his mouth. I saw this, and I heard what he said. He said, "My friendly forces, we want to see Wadi Salih [a huge area encompassing Mukjar, Bendsi, and all the villages therein] and Mahroung left in ash. Children from fifteen down, leave them. All people from sixty and over, leave them. But the others, kill them!" And that is what happened. I saw with my own eyes so many people killed. I saw many of my friends and schoolmates killed. They were killed in many, many ways.

The soldiers, all the day, collected people, and took them to the prison. At the prison you would not believe what was happening there. Have you ever seen a prison cell so full that you could not close the door? In order to close the door, they backed a Toyota Land Cruiser up to the door, shut the door as far as they could, and then had the Land Cruiser push the door shut. The people were screaming as it crushed them. This happened in one big room. There were more than 150 people in it.

Those who were killed were pulled out and tossed in the corridor, and those who were not killed were taken the next day from the prison and killed. To the killers it did not matter [how the victims were killed], to them it was the same.

Before taking the people out to be killed, they ripped a piece of clothing off each person's clothes and used it to put over his eyes. Then they took them in many different vehicles. In Land Cruisers with camouflage, they packed about fifteen in each one, and took them to a place called Bediger, outside of Mukjar. They also used Renault Lorries in which they loaded many people.

The *Janjaweed* surrounded the entire village so no one could get out of the village, and so no food could get in. Once all the food had been eaten, we had no hope of obtaining more. Many of the children and pregnant women and the elderly people got [contracted] diarrhea and malaria. Many, many died from these illnesses. Hundreds died. The exact number I do not know.

There was nothing to do but to throw the dead bodies outside [houses] because the men were hiding and could not bury them. You saw bodies everywhere, all around, and dogs would eat the dead bodies.

The soldiers would take the men out to Bediger, which is a small *wadi*. We would see the vehicles leave full of men, we would hear the sound of shooting, and we would see the vehicles returning empty,

only with the driver and soldiers. This happened over and over again, over many days.

At first, I didn't move. I stayed in one place. I was lucky and didn't get arrested. But people who tried to get food and went to the *suq* were called Tora Bora [a slur used by the Sudanese government and *Janjaweed* to suggest all black Africans were rebels or terrorists], and they were arrested.

We did leave our homes, though, when we heard that the Jesh were checking houses. We left and hid in the bushes. There had been a lot of rain [earlier], so the bushes were full [thick]. But that was jeopardizing our lives, and so we chose to leave the area [even though it was extremely risky being out in the open where they could be detected].

We thought that there was no hope, no solution for us there, and we heard about people going to Goz Amer [a refugee camp based in south-east Chad just over the border from Darfur], and we chose to go, too.

We walked many, many days, but only at night did we walk. We traveled by foot from Mukjar to Bendisi, and from Bendisi to Khorbranga [located on the border of Sudan and Chad but located in Sudan], and from Khorbranga to Dogdore [which is located in Chad]. From Dogdore, we used a vehicle to reach Goz Amer. I traveled with my brothers [Asadig, twenty-four years; Abdella, twenty-six years; Abdelbassid, twenty-two years; and Salim, eighteen years].

My father, mother, sisters, and cousin traveled by lorry and arrived four days later in Dogdore. They, too, moved on to Goz Amer and then Goz Beida. One sister remained in Sudan with her husband.

So, we first went to Goz Amer in January 2004, and we stayed there one week. Then UNHCR arrived and took us here, to Goz Beida. So, like that, I lost my opportunity to study at the University of Sudan.

I've now been in Goz Beida five years. We are simple refugees who depend on the UN to give us food. It is not a good life. I have a very big family, and I desire to complete my education.

As I said, I am married now, to my cousin. The agreement to marry her took place in Sudan, in Mukjar, but the ceremony took place in Goz Beida.

The family of the girl, and particularly her father, said, "My daughter was raped, but that was without [against] her will. What can I do? I cannot send her away."

In our culture, when a girl is raped, the raped girl is a shame for the family. But for the raped girl herself, she feels sick because of what others think of her. But I, myself, I have suffered a lot because of those people [Government of Sudan troops and the *Janjaweed*], and those who raped her. So, because of this—and because my father suffers, my mother suffers, my sisters suffer—I believed I should marry this girl to prevent her from suffering more than she [already] does. So I decided to solve this problem [the issue of shame] and to keep her with me, with us, and to tell [convey] to her that this problem [the rape and the accompanying shame usually associated with rape] is nothing.

My family, my father and mother, were there when the girl was raped. But even my mother didn't accept me to marry her, even though my mother is the aunt of the girl. But my father said, "If you can accept it, marrying a raped girl, we will arrange for the wedding." My brothers and sisters thought it was shameful for me to marry this girl. But I talked with my cousin and she said, "I was raped and I had no choice, and I am sure I would not find anybody to marry me in this area. If you accept to marry me you are the only one who would [will]."

My mother was against this marriage, and had already planned to give me her sister's daughter. This girl, the raped girl, my wife, is the daughter of my uncle on my mother's side.

So, the marriage was against my mother's wishes. In the beginning, I lived with my family, and [over time] my mother saw that my wife was good with me and now she believes the marriage is good. Me, I am very happy in my marriage.

In this camp, Goz Beida, no one knows my wife was raped. But in Goz Amer, some people know it. In the beginning, people in Goz Amer treated her poorly. But they now know she is not a criminal, the others are the ones who committed the crime.

I don't think the situation in Sudan is going to change soon. In our situation, if we returned to Sudan they will [would] just kill you and forget about you.

I don't want to return to Sudan poor like this. I want to obtain an education. I wish to live somewhere other than Chad because we've been here for five years and nothing has changed.

I think the international community is trying to change the human rights situation in Sudan, and one way it is doing that is by condemning the Sudanese government's behavior against us. But the international community is not vigorous enough in pushing the Sudanese government to change its behavior. Also, the people who committed these crimes are still in power, and they cannot judge themselves, and so what we want from the international community is for it to arrest and try these individuals. That way Sudan will be better, safer, and we can return and help solve our other problems. Also, the international community is not helping us with education or helping us to find work so we can help ourselves and our families.

Khalil Ramadan Ahamed (Note: The interviewee requested that he be allowed to go by a false name "for reasons of security") was born in 1969 (unsure of the month and day) in the village of Ras Alfil, West Darfur. He is a member of the Fur tribe. He has thirteen years of education. He is married and has four children. He arrived in the refugee camp at Goz Beida, which is located in southern Chad along the Chad/Sudan border, in July 2008.

The interview was conducted by Samuel Totten on December 12, 2009. Hussein Idriss served as the translator. The interview was conducted in a room of a large tukul at the Oxfam Compound in the village of Goz Beida.

The problems in our area [Ras Alfil] started in 1989. There was a meeting of Arabs in Ed Deain, and they decided that no Fur peoples should remain in Darfur. After the meeting, those leaders in the meeting spread the word to other Arabs and the others spoke proudly [boasted] that they were going to take our, the Fur's, land.

After this meeting, the Arabs began carrying out armed robbery against the Fur, Massaleit, the Zaghawa, and Dajo. Weekly, many robberies took place in many different parts of our area. People complained to the police, but the police said they had orders not to leave the police station. They also said they had no vehicles [with which to chase down the criminals]. All the police officials are Arab, and they only protect their own people.

Our people had no weapons, so they could not defend themselves against the armed robbers. If they even tried they would have all been killed.

My cousin [name withheld for reasons of security], forty-five years, who lived in Ras Alfil, was robbed when he was returning from the *suq*. Three armed men threatened my cousin and those with him with arms (the kind I don't know) and took everything they had. With my cousin were two people, but behind them were more people, and the Arabs robbed all of them.

In 1989, there was also organized robbery [during which] the Arabs stole many cows. At this time, the Arabs also brought their animals, camels and cows, and let them graze on our agricultural land and they destroyed it.

Arabs attacked our village in January 1991. More than 200 Arabs attacked us. They killed my father and two teachers. One of the teachers was the director of the school, Mahmoud. I don't know his other name. They were all killed on Saturday. All three of the men were buried in the same grave. The people who buried them were not from our village; they were from Forbranga. They buried the men quickly and hurried away. They buried them because the people of our village all fled from the attack. We all fled to a village called Touktouka.

Other people who were killed were the sheik and his son, near Wadi Salih, by the same attackers. There was also a third group killed, composed of twelve people from one family. Those twelve people were buried in one grave.

This attack took place in the evening, Friday evening, around four o'clock. There was a group of black African women cleaning their grain, removing the husk, and some Arabs approached and demanded that they be given grain for their animals. The women resisted, and as they argued a group of soldiers, an officer with seven soldiers, was passing by and stopped and pushed the Arabs away. The officer said, "I will leave these soldiers with you and tomorrow I will bring more soldiers to protect you." The officer went to see his superior, Salih Adam Shain, and the superior said, "This is a big problem, and I will go myself." He took forty-five soldiers. He took that many because he knew of all the problems in this area.

The women were very happy when they saw the soldiers, and they made food for them. This was Saturday. The head of the soldiers is from a

tribe called Salmat, an Arab tribe. When he brought his forty-five soldiers, he took them and headed north of the village. There, he [and his men] fired shots in the air with many heavy weapons—RPGs. When [they] shot like that, the Arabs attacked the village.

More than 200, maybe 300 or more, Arabs attacked the village. From two directions they came, the east and the north, shooting the entire time, with GEMs, Kalashes [Kalashnikovs], and RPGs. They burned down the whole village, and killed thirty-five people.

I, myself, with my mother, sister, and two brothers, were in the village. My father was at the primary school. We all—my mother, sister and brothers, and me—all ran together, in one direction, to Touktouka. Those who didn't flee risked being killed in the village.

The people who buried my father and the others told us about my father [his death and that they buried him] when we visited his grave in 1992, when we returned to our village.

The Arabs chased us, were running after us, but we arrived safely in Touktouka. When we arrived there, we were in a very bad situation, and soldiers from Forbranga came and took us to Forbranga. The *umda*, Abdelhamid Ishak Nahid, from Forbranga, organized the soldiers to assist us. We stayed there until 1992, when a reconciliation was brought about between the Fur and the Arabs by force because the government feared the rebellion of Daoud Yahya Bolad,⁷ who was based in the south with John Garang.⁸ The government knew that the black Africans were ripe for rebellion because the Arabs had been attacking them, and the government was doing nothing to halt the attacks or to help the black Africans.

The Arabs said, "What is in this [the reconciliation] for us? We have weapons and we have displaced the black Africans from their land, and

⁷ Daoud Yahya Bolad was a guerrilla commander for the Sudan People's Liberation Army (SPLA). Prior to the 1989 coup d'état in Sudan, which was engineered by Omar al-Bashir and his cronies, Boland, a Darfuri, had been active in the Muslim Brotherhood and was a senior member of the National Islamic Front (NIF). Following the coup, Bolad left the NIF and Sudan. He left for a host of reasons but a main one was that he was disgusted with the racial discrimination of the national political elite who, he believed, prohibited him from advancing in the NIF. Tellingly, Bolad later asserted that "even when I go to the mosque to pray, even there, in the presence of God, for them I am still a slave [*abd*] and they will assign me a place related to my race." After meeting with John Garang, leader of the Sudan People's Liberation Army (SPLA), which had been engaged in the Second Sudanese Civil War in south Sudan since 1983, Bolad joined the SPLA in 1990. Ultimately, Boland was captured by the north, tortured, and died in 1992. It is generally believed that he was killed while in detention.

⁸ John Garang was a co-founder of the Sudan People's Liberation Movement (SPLM). He served as the chairman of the SPLM and the commander of its armed wing, the Sudan People's Liberation Army (SPLA). After twenty plus years of fighting (1983 to 1995) and over two million deaths, the Comprehensive Peace Agreement was signed by the north and south. Part and parcel of the CPA was the appointment of Garang as vice president of Sudan. However, three weeks after his appointment as vice president of Sudan he perished in a helicopter crash.

we have the power." So, the government said to the Arabs, "We will give you thirteen positions of *umda* in the Fur's area." And they were given that power. All the *umd*as were headed by an *amir* named Hussein Said Alhelo. They also named Ali Koship⁹ head of the *Janjaweed*—at that time, though, the *Janjaweed* called themselves *Fursan* [man on horse or horse-man]. He and his forces were to be ready to fight the rebellion from the south. At this time, I returned to my village, Ras Alfil.

The Arab *umd*as were now a part of this area, and if you wanted anything [e.g., solutions to a conflict, to discuss certain political issues, a need for social services] you had to seek permission from them first. Also, since the Arabs were legally there, other Arabs moved to the area and they began stealing our animals. Also, spies arrived and reported on black Africans to the government [any meetings we held, what was said in the meetings, any criticism of the government, any complaints about the presence of the Arab *umd*as in the area, and other information not even dealing with the government].

The government decided to divide the Fur, which was the biggest tribe in Darfur, into three regions so as to make them the minority in each region. Up to this time there was one Darfur, and the capital was El Fasher. So Darfur was divided into North Darfur, South Darfur, and West Darfur. This division was carried out solely to divide the Fur. Khartoum did this without the consent of the Darfurians.

We continued in this situation up to 2002. Again, we had returned to Ras Alfil in 1992 and remained there through 2002. We were not attacked again in those ten years, though there were small incidents.

At the end of 2002, November or December, the Arabs held another meeting and decided to attack the Fur and steal their animals. The meeting was in Kass. The meeting involved all of the Darfurian Arabs. This was with the help of the Sudanese government. The people, the black Africans, who lived in Kass told us about this meeting.

In 2003, the Arabs started implementing the decision to attack people along the paths and on their farms. The people of Jebel Mara, the most powerful Fur, decided to defend themselves and organize themselves in groups. In order to defend themselves, these groups formed the Sudanese Liberation Movement (SLM) in February 2003. The SLA (Sudanese Liberation Army), the armed wing of the SLM, which became the SLM/A), then carried out attacks in Tina on 25 March 2003 and El Fasher on 25 April. The government reacted by arming all the Arab tribes in Wadi Salish. The government also armed the Tama and Gamir tribes, black Africans that

⁹ A high-ranking Janjaweed leader, Ali Koship is wanted by the International Criminal Court (ICC) for over 40 counts of crimes against humanity and war crimes—for directing and taking part in killings, rape, destruction of villages, and forcible displacement of black Africans in West Darfur. During 2003–2004, Koship was the most senior commander in the Wadi Saleh area in West Darfur.

supported the government. The attacks by the government and *Janjaweed* in our area began in July 2003.

On 21 August 2003, I was personally attacked. I was in the *suq* at a village called Angkoti, and two *Janjaweed* and two police, a military policeman with a red beret and one with military intelligence, took me to Forbranga to a military garrison prison. The head of the garrison at the time was called Abualgasim Mohammed Daoud, and there the four men mistreated me. They accused me of four things: first, as the director of the school, I refused to allow teachers to teach the students jihad poems; second, they accused me of inciting young men to rebellious activity against the government; third, they accused me of helping the families of the rebels; and fourth, they accused me of teaching the children a curriculum that the government didn't approve of [like teaching the Fur language in school]. They beat me to [try to force me to] admit this, but I refused to do so. They beat me with an iron bar all over my back. I still have the pain to this day. They kicked me and they poured cold water over me as I tried to sleep. This lasted one week. I was beaten every night. Three people with masks, so I could only see their eyes, entered, and all three beat me for more than one hour. The seventh day, in the evening, the head of the garrison pulled me into his office, along with the military intelligence officer, Habedin, who wrote down what was said, and the head gave me [outlined the] conditions if I was going to be released. The conditions were: "First, don't tell anyone what happened to you in this place; second, every weekend you must return here and provide information about the movement of the rebels; third, after you leave here you must not travel anywhere unless you return here and inform us."

I refused to accept those conditions, and they put me back in the prison for one month. From that point, they came and beat me once a week. After one month, they offered me the same conditions. Again, I refused.

Information then came from the head office that the rebels had held negotiations with the Sudanese government, and an order came from the president [Sudanese President Omar al-Bashir] that all prisoners who had anything to do with the rebels should be released. They came again with the same conditions and told me that I must sign the conditions and leave. I decided to leave the prison, and so I signed.

I traveled directly to Khartoum because Khartoum is a very big place and I knew nobody would know where I was and come and harm me. I went to an area there inhabited by a Fur tribe. But then the government attacked this area. It started by searching house to house for rebels. I remained there for one week. A friend then helped me to leave the area because the government was arresting people. That friend prepared documents for me and took me to Wadi Halfa, on the Sudanese and Egyptian border. From there, I entered Egypt.

I didn't even think about joining the rebel groups. I am an educator and do not like the military.

When I left, the *Janjaweed* contacted my family in my home village, my wife and children, and asked, "Where is your husband and your father?"

They said, "We don't know. Maybe you killed him."

They threatened my wife and children, and this intimidation caused them to flee to Chad in 2004, to Goz Beida [a refugee camp in southern Chad, along the Chad/Sudan border]. When one of my friends learned that my family was there, he contacted me in Cairo and informed me of that.

I remained in Cairo for four years, and then I decided to go to Chad, to Goz Beida. To get to Goz Beida I had to travel through Sudan. There is a special group in a place called Wadi Halfa that can transport people any place in Sudan without the knowledge of the authorities, and so I used their services.

By that time, my mother had died and my sister and brother were living in Mukjar. I went straight to Goz Beida. In those areas [in Sudan] where people knew me [while traveling through Sudan], I did not go.

I do not want to return to Sudan while this government [under Omar al-Bashir] is in power. I want to live in a place safe for my family and me. There [Sudan, today] is not good, not safe.

Yahya Adam Adelmoulla was born in 1977 (month and day unknown) in Austani, Mukjar, West Darfur. He is a member of the Fur tribe. He completed fourteen years of schooling, through high school. He is married with five children. He arrived at the Goz Beida refugee camp in June 2003.

The interview was conducted by Samuel Totten on December 13, 2009. Hussein Idriss served as the translator. It was conducted in a small room at the Oxfam Compound in the tiny southern Chadian desert village of Goz Beida.

Since 1984, we had problems with Arabs bringing their animals, camels, and cows on our farms and destroying our crops.

I was young, but I remember that in 1986, Arabs brought some animals on our farm and my uncle, Adam Adam Abdrahama, tried to chase the animals away and they [the Arabs] beat him with sticks and a whip and broke his leg. Until now he walks crooked [with a limp].

The [Arabs'] animals remained until the Arabs left and the animals destroyed the entire farm. Our family could do nothing because the Arabs were armed, and at that time we had no weapons, so it was safer not to confront them.

Around this time, there were many roadblocks. As people [black Africans] traveled to the *suq* on donkeys and on foot, they would be robbed by Arabs. One of my other uncles was robbed in this way. He, Mohammed Khammis, was returning from the *suq* and was with his camel and he was attacked by Arabs. They shot him in the leg and shot him in the head, in the left eye. They also stole his camel and all his goods. That was his only camel. To this day he cannot see out of his left eye. Also, his leg, to this

day, is bad, and he can only move by donkey. Nothing happened to the Arabs.

The government office is seven hours by foot from our village, so if you go and come back, the attackers would already be gone. So, there was no point in trying to report them.

Also, at this time, when younger herders, children, took their sheep and goats out to graze, the Arabs came with weapons and stole their animals. This never happened to me out of town, but we were robbed at our own home.

At seven o'clock in the evening, Arab attackers forced their way inside our compound. We were taking our dinner. They began shooting with weapons, the bullets sprayed all over, not automatic weapons but single shot [like a shotgun or a pistol]. And as they shot in the air, they began stealing all of our sheep and goats. The goats were too much [so many, he has no idea of the exact number], and the sheep, seventeen. They would only shoot you if you resisted, so no one tried to stop them.

In '87 [1987], October, we, five people, children, five boys, were going to a school in Mukjar, and Arabs attacked us. They killed two of us, and three of us escaped. There were three Arabs. One Arab stood in the middle of the road, a simple road [dirt path], and ordered us to stop. When he ordered us to stop, we started running, and two other Arabs in the bush began shooting at us, along with the first one. The children who were shot were about eleven and thirteen years.

When we were running away, we dropped everything, including our books. When the old people gathered the dead boys to bury them, they found their [school] books, and all had been burned.

My father decided I should not return to the village since it was so dangerous. So I remained in town at school and did not travel back and forth. I was very fearful of traveling. If I saw anyone carrying a weapon, I grew fearful.

In '87 [1987] there was extensive robbery on all the paths. Those who resisted or tried to escape were the ones who were shot and beaten.

Eighty-eight [1988] was a disastrous year. There was a lot of fighting everywhere. Our village was attacked and we were displaced from it, and we did not return for three years.

In October '88, when the crops were still not ripe, the Arabs decided to bring their animals and let them graze, which would have destroyed our fields. When the villagers went out to prevent the Arabs from destroying our crops, my father was killed. When my father and the other men were about to cross a *wadi* on the way to their crops, the Arabs shot at them. Seven other men with him were also killed.

My uncle and others went at night and collected all of the bodies. Because the people were so afraid, the bodies were just put under [the ground, and buried where the bodies were found], and they left immediately. It was not a proper burial with all of the rituals and ceremonies.

The next day, at ten o'clock in the morning, the Arabs attacked our village and two others, and destroyed them by burning them all the way to the ground. I cannot tell you how many attackers there were there were so many, maybe 100 to 150.

They attacked on camels and horses and on foot. They killed many. Many, many people died. They also kidnapped children, boys and girls. They used the boys for herders. We know this because when we fled to Chad we saw some of them again. First, they were used as herders in Sudan and then, during the fighting, the Arabs crossed the border with the boys and made them herd animals in Chad. The girls, 'til today, no one knows what happened to them.

When the attack took place, we, all my family [eleven of us, my grandfather, my two young sisters, my mother, my two aunts, four uncles, and me] all fled to the jungle. We fled together. We had one donkey, and my sisters [one two years and one five years] rode on the donkey. My grandmother was not strong, so she could not carry anything. We went to the *wadi*, which had lots of trees, water, and thick grasses, so no one could see you. Our area is very rich in water, and so we call the area by the *wadi* a jungle. We stayed there for two days.

I could see the smoke of the fires as the villages burned. All over the sky there was smoke.

My uncle climbed a tree so he could see what was happening in the village. He told us that the Arabs were on horses and in their hands they carried sticks with fire on the end, and they stuck those sticks with fire on one house and then another and then another as their horses were running along.

Our uncle also saw the Arabs chasing people, people who were running toward the *wadi*. My uncle saw the Arabs grabbing children up, but he didn't know who the children were. He said they were picking up the children and carrying them away on their horses. My uncle said we must leave so we would not be captured. So we ran deeper into the *wadi*. Then, after two days, the old people decided we should go to my mother's family's village, Artala.¹⁰ That was six hours on foot, but it took us thirteen hours because my grandmother could not walk quickly. My uncle who climbed the tree knew the area very well and took us there, not by road because he knew it would be dangerous. So we walked across the land,

¹⁰ Comments by the interpreter: "Artala is the most beautiful area in Western Darfur. It is like an island; it has water all around. It is a *wadi* full of water all the time, and is lush with trees and bushes and grass and fruits (bananas, mangos, papaya, guava), and the people grow potatoes, carrots, onions, sweet potatoes, watermelon, and cucumbers. The Sudanese government displaced all of the black Africans from the area and presented the area to Arabs and built schools and gave them security. No black Africans live there now. Not a single black African. It was taken from the Fur tribe in 2002."

not on simple roads [dirt paths], and it was very difficult because you would step on stones and twist your feet [ankles] and hit your toes and cut them. It was very difficult for my grandmother, as she was very weak and tired. After we arrived at the village, we slept there and the next morning, she, my grandmother, died.

In Artala, which was a very large village, we settled in the western part. The next day the eastern part of Artala was attacked by Arabs and was burned down. So we decided to leave because it was too dangerous to be there. We left for Mukjar. We walked two days to reach Mukjar. No paths, away from where we might be attacked. We went [created] our own way.

A lot of babies died on the way. We walked for nine hours, and there was no water. It was summer and it was very hot. There were many, many families walking to Mukjar. The children's stomachs were sick [upset] because they had no water, no food. The mothers carried the babies on their backs, and many of those babies died from no water. When we reached a *wadi* [where there was water], we buried six who had died. We do not bury the dead without water, as there are rituals involving ablutions that must be carried out. After walking again all night, nine babies and young children died and, again, at the next *wadi*, we buried them. Because the old people were weak, they could not dig many graves, and so the babies, each time, were buried in single graves [mass graves].

The people, black Africans, in Mukjar welcomed us and treated us well. They gave us land and built huts for us.

I studied all my intermediate years in Mukjar. In town, in Mukjar, life was very good. But when people left the center and went outside with their horses and carts to collect firewood, the black African men were robbed and had their animals taken from them by Arabs.

During our time in Mukjar, the elders traveled back to our farms. We are farmers and not townspeople. So after a while it was decided that it was useless for the elders to go back and forth or to remain in Mukjar, so they returned to our land.

The situation remained dangerous in Austani and so only the elderly went back to the farm. The younger men would have been attacked and killed so they did not return. Also, there were no schools there for older students.

Eventually, the situation calmed down and we returned to Austani. This was in '92. Many people returned. But many of those families whose children were still in school remained in Mukjar. There was a school through fourth year [grade] in Austani, and my sisters studied there. As for me, after we returned to our village, I went to study in another town, Garsila. I took my provisions [food] with me, and when my provisions were depleted, I returned to my village for more and then returned to school in Garsila. I remained in Garsila for two years, to 1995. Because there were

many problems traveling, many robberies, I abandoned my studies and returned to Austani. I was never robbed myself, but I feared it would happen.

We remained in Austani until 2002. During that time I taught school, Arabic, at the primary school, Umkhir, and farmed. I owned twenty hectares. It was the farm of my grandfather, a family farm. I grew groundnuts [peanuts]. There, we farm twice a year; once in the rainy season and once in the summer. During the summer, students would help me. We also began to breed lots of animals, mainly sheep and goats. It is good to have sheep and goats because you get lots of milk.

I farmed alone, but when students saw me working alone, they came and helped me. I like working alone, but when the students see the teacher working alone they think they should help the teacher. When I plowed, I attached a plow to a donkey and I put my little sister on the donkey, and she guided the donkey.

At that time, the strategy of the Arab robbers changed. Instead of robbing people atop [riding] their animals, they began attacking large vehicles, such as lorries that transported goods and people.

In September 2002, Arabs attacked our village at nine o'clock in the morning, and the attack continued the whole day. They killed thirty-six people. In our village, we have four or five camels to operate our oil press. The press crushes groundnuts and makes oil, and some Arabs, just before the attack, stole all the camels. Then, immediately, the village was attacked. The attackers came from two directions, one group from the west and one from the east. There were many, many attackers, not less, I think, than 1,000. This time everyone just ran by themselves to get away, did not run together. I had my bicycle at that time, and I fled on it. On the way, I came across my sister, Amani, and picked her up and fled outside the village to the *wadi*.

The village was totally destroyed. They put fire to the village and destroyed everything they could not loot. As we fled, I saw the attackers putting fire to the village. This time it was a weapon that made the fire. They shot *danās* [two-foot-long projectiles] from handheld weapons. When the *danās* hit the hut, it burst into flames. We fled through the smoke clouds, but around us was the shooting and the bursting of the *danās*.

We stayed in the *wadi* until dark, and then we traveled to Mukjar. There was no way to search for my other family members because the Arabs were armed and harming people. This time there was no security [safety provided by the police] in Mukjar. The government accused everybody of being rebels, and arrested many and carried out collective killings. Because I knew Mukjar from before and knew many children [from school], we stayed with a family we knew. When I arrived there that first week, I heard about the collective killings [in his village] and that about fifty people had been killed that week.

A man, Musa Bashir, who had a very large garden in our village and had hidden in his garden during the attack, traveled to Mukjar to tell us that after the attack he saw many wounded people who had been left behind unable to help themselves. My mother, my younger sister, and my brother had not arrived in Mukjar, so I returned to the village to see if they were among the injured. I went on bicycle, and it took me three hours and a half. There was a high possibility I could [have] be[en] attacked by Arabs along the way, but I had already lost my father and now my mother was missing, and I was crazy [crazed], so I went in search of her.

The entire village was gone, totally destroyed. There was only smoke rising from the ashes. Only three or four donkeys were walking around amongst the ruins.

Outside the village, in a brook, I found two people—one a dead body, my auntie's son on my mother's side, Jabal Aldar, forty years, and another, Jamal Zakeria, twenty-four years, my father's brother's son, who was injured. His right leg was shot, and his shinbone was sticking outside the skin. He had been carrying the other man, his cousin, who had been shot in the chest. He spent the entire week there, not able to move or to bury his cousin after he died.

When I arrived there I tried to put him on the bicycle, but I was unable to do so. So, I looked around, this was at night now, and I saw a man chasing after a donkey. I followed him, and when I got a good look at him I recognized him and called to him. He asked me to help him catch the donkey, and after we caught the donkey I told him I needed to have him help me put my cousin on the bicycle. He said, "No, let's put him on the donkey. It's better. Then I will return to Mukjar with him and you can remain here." But I returned to Mukjar on my bicycle because my cousin, with the wounded leg, had already told me that my mother had gone to Mukjar that very day. I had come along one path, and she had traveled another one. She [had] remained in the *wadi* for a full week because she had children and was fearful of moving with them, as she thought the attackers had remained in the area. In fact, many people remained in the *wadi* longer than she and my siblings did.

Mukjar was worse than the outside. As I said, the government suspected everyone of being rebels and beat them, arrested them, and killed them.

At that time the town was full of *Janjaweed*. I was at a meeting, August 2002, that all of the people were ordered to attend by the officials of the locality. The meeting was held in a vast dusty area surrounded by walls. Speaking to the mass of people was the Minister of Interior, Ahmad Haroun. He arrived in a military helicopter. But also there were Ali Koship, head of the *Janjaweed*, and Def Alsimia, another leader of the *Janjaweed*. Ahmed Haroun said, in front of us but speaking to the *Janjaweed* leaders and the *Janjaweed*, themselves, that "[t]hese Fur and Massaleit are criminals, and everything they own [animals, houses, everything] is now

yours, and anyone who wants to resist, kill him. Take everything from the Africans in Mukjar and east of Mukjar, and kill them.”

The people, the black Africans, began fleeing as soon as they heard his words. But as they fled, they were met by Antonovs and helicopter gunships.

For more than two or three days the Antonovs, all white, and the helicopter gunships, camouflaged, had been attacking villages nearby, and those people who moved in a group were bombed and shot [strafed] by the helicopters. Some people ran to the east, and some people ran west, toward Chad, any place they thought they might be safe.

There were two or three Antonovs and two or three helicopter gunships. The Antonovs were dropping *danas* [big projectiles], and when they hit, boom, they exploded with fire and sparks bursting into the air. Many people were killed and injured as they fled from Mukjar.

As I fled, I headed back toward the main gate/checkpoint at the entrance to Mukjar, and, there, I was arrested by the *Janjaweed* and handed over to the government police. Before I arrived at the prison, the *Janjaweed* and police beat me with sticks and batons. They forced me to go on foot to the prison, and they beat us as we went.

At the prison, they poured hot water from an iron pot on my head and shoulders, and they beat my head with a stick, cutting it open badly. [The interviewee still has a large triangular scar on his forehead.] They also beat my left hand with a stick and broke it.

They held me eleven days, and every night they tortured us. There was screaming all night long, people crying for help. While I was there, they kept taking people out of the prison and killing them. And every day more people were brought into the prison.

Finally, a committee comprising the African Union, United Nations, and Sudanese government came to the prison, and we were released. This was early September 2003. I left Mukjar right away and traveled to a place called Um Dukhun, on the border of Sudan and Chad. It took me three days to reach there. I paid a lorry driver in Mukjar, and he drove us to Bendisi and from there to Um Dukhun. I stayed four days in Um Dukhun to try to figure out what to do, and then I left for Umzel. I remained in Umzel, where I worked as a harvester, for three months to make money. An organization, COOPI, came to Umzel to help refugees, and they brought medicine for us, and then UNHCR and Intersource [an Italian nongovernmental organization] came to Umzel, and we were taken to Goz Amer [a refugee camp in southern Chad, along the Chad/Sudan border]. We were in Goz Amer for fifteen days. We were told we were in transit and would be taken to Goz Beida. After fifteen days, we were taken to Goz Beida.

My wife, whom I married in 1999, was with me in Mukjar, but when I was arrested she fled Mukjar. When I arrived here in Goz Beida, I sent for her, and she is now with me. Only one of my brothers made it here. All the rest of my family is still in Sudan.

I wish to return to Sudan when the situation changes and the security is good. I wish to return to my village. We will have to rebuild it. The village is where I was born and grew up. It is my home.

Kaltouma Mohammed Adam was born in Juqma Algarbia, West Darfur. She does not know what year she was born, but thinks she is about twenty-three years old. She is a member of the Massaleit tribe. She has four years of education, all at the primary level. She is married and has three sons. They reside in the refugee camp located just outside the tiny desert village of Goz Beida, which is located in south Chad, along the Chad/Sudan border. She has resided in the refugee camp for six years.

The interview was conducted by Samuel Totten on December 13, 2009. Hussein Idriss served as the translator. It was conducted in a small room within the Oxfam compound in the dusty village of Goz Beida.

There were lots of problems in the 1990s, but the main problem was in 2002. I was very young in the 1990s and do not remember [specific] events. In the late 1990s, many animals were taken from our village, including those of my own family.

Arabs came to the hamlet, Soumo Kiting, where we kept our animals and stole them. It was the time before the rainy season, the time to prepare the land. It was May or June.

Our father, who died many years ago, had the Foulani tribe taking care of our cows. [The interpreter noted that the Foulani tribe is one of the largest tribes in all of Africa, and that they specialize in the breeding of cows.] Soumo Kiting is about two hours by foot from our village. Arabs attacked and stole 150 cows of ours. When my brother, Hamid Mohammed Adam, was informed that our cows were stolen, he and several others chased the thieves, and when they reached the thieves he saw our cows. As he began racing towards them, the thieves shot and killed him. He had no gun, only a spear and a bow and arrow. He was brought to our village, our tukul [round mud walled hut with a conical thatched roof], and after one hour and some minutes he died. He had been shot in the side.

When he was brought to us by the villagers, my sister, Mariam Mohammed Adam, saw the dead body of my brother and she went mad. We all screamed and screamed, but even after we stopped, she kept screaming. Even today she is foolish ["mad," as the interpreter put it, or mentally unstable].

No one arrested the men who killed my brother or stole our cows. Our people did not have weapons, guns, and bows and arrows and spears are not weapons to use when battling those with guns.

On 14 August 2003, there was an attack in Bendisi, and two Fur children, nine and ten years, who fled the attack, arrived at our village and informed us of the attack. It takes two days by foot to reach Bendisi from our village. The two boys knew no one in our village, but were just running in fear. Both were injured. The Arabs had put fire on the huts, and the

boys both entered the huts that had fire put on them and the fire fell on the boys. They had open wounds on their heads and shoulders. It was raw, but it wasn't bloody but dry. It was like water under the skin [large blisters]. One boy's head had pus oozing out. They had no clothes on except underclothes.

The boys were kept by a family and helped, and in about a week one of the boy's family members arrived searching for their son and brother, and recognized the other boy as well, and took them both with them.

At that time, when the boys arrived, I was in Jugma, with my family, my brothers and sisters, and I stayed one week in Jugma as I worked as a trader in the *suq*. We were very worried about what happened in Bendisi, and not only Bendisi, because all the villages around Jugma were being destroyed.

Around this time, the Arabs who lived outside Jugma entered Jugma and forced all of the people to swear on the *Koran* that they would not leave Jugma and that they would not harm Arabs. The Arabs promised not to harm the Fur, but they did not swear on the *Koran*. The Fur are not the majority in Jugma, the Tama are. The Tama and the Arabs fight all the time together and have a special relationship. They are allies.

Each area in the village [of the black Africans] has a sheik, and each sheik was told to assemble his people and they were forced to swear on the *Koran*. Before the people came together, the sheik told the people that the Arabs were forcing him and them to swear on the *Koran* and that if they didn't they would all be killed, along with him. So the people agreed that they would swear when asked. They also understood that even if all of the people did not swear on the *Koran*, it was enough for the *umda* to swear [meaning that the *umda* virtually spoke for his people, and by doing so they had to honor what he swore to on the *Koran*. Thus, if he swore on the *Koran* they were obligated to do as he promised, and since that was the case there was no reason for them to refuse to swear on the *Koran* since refusal would result in their deaths].

The Arabs did not want Jugma destroyed because it was one of the biggest villages and the place where the Arabs could obtain what they wanted and needed. So they forced all of the people [inhabitants] to remain in the village and began raping the girls and women.

Today, there are many children who were born due to those rapes. Some of my family was raped there. My older sister, who was not married, was raped twice and both times she had a baby from those rapes. Two babies!

Arabs and GoS soldiers did this. Anytime they wanted to rape her, they did. If they saw her in the *suq*, they'd take her; if they saw her along a path and wanted to rape her, they would. And sometimes they even came to my family's home and took her with them and raped her.

One of our brothers saw that she was bringing a bastard child to our family and told her that it's not acceptable to the family. He talked very hard to her. When the men came again for my sister, she told them that our brother was very mad about what they were doing to her, so they

went to see my brother, and told him: "This is none of your business, and if you scold this girl again, we will kill you."

My brother told the man who raped her, "If you want to marry her, then marry her and have legitimate children."

The man said, "I will not marry her, and if you interfere I will kill you."

Our brother could do nothing. These people are colonizing [controlling and terrorizing] our brothers.

Because we could not leave the village and could not change the situation, our family gave her [their sister] a separate plot to live on in which there is a one-room hut and a fireplace outside [a lean-to] to cook meals on.

When I returned to Monono, I traveled with six other women. All are my family members: my father's mother, my father's brother's daughter, my father's mother's brother's grandchild, and other female relatives. We arrived at a *wadi* at four o'clock in the evening [afternoon]. That's the time that the *Janjaweed* rob and kill people.

We were on donkeys. I was in front on my donkey, carrying cooking oil and onions. That is my trade; I trade in oil and onions. When we were crossing the *wadi*, four Arabs approached with their weapons, Kalashnikovs, and they shot four bullets in the air and forced us to stop. They ordered us to get down from our donkeys. They were in civilian clothes, but had turbans on, with only their eyes showing. Two women in the middle [of her group] jumped off their donkeys and fled on foot. The Arabs rushed over to my donkey and pulled all of the goods off of it and placed them along the path. While two remained and kept their weapons on us, one took the oil across the brook. Then the man who took the oil came back to take my shoes, money, onions, and the biscuits I purchased for my children.

I said, "Don't take these things [the biscuits]."

He said, "Forget about these things. I not only want your goods but you also."

All the other women began yelling, "We do not accept you raping her!"

Then I went to retrieve the oil. One of the other women went with me to try to protect me from rape, but then all three of the men shot their weapons in the air and the child on the back of the other woman started screaming. When the child started screaming, she [the mother] stepped away from where we were. When she stepped away one of the men said, "We will not only rape you, but impregnate you with a child."

I told them, "Instead of raping me, it is better to kill me."

Immediately, one of the men hit me on the neck with a stick from behind, and I fell down. One came with a knife and ripped off my *tob* [a sari-like dress] and sliced off my underclothes with the knife and threw me to the ground and started raping me. The other women screamed and screamed until they finished.

After all three raped me, they took the oil and poured it on the ground. Then one said, "You are rubbish! Get out of here!"

As I got up, one said, "We could rape you anywhere. Even in your village."

Because all of our families knew we were supposed to arrive back at our village at a certain time and we had not arrived, they came looking for us. My husband was with them. When my husband approached me, I told him what happened, and he said, "Okay, let's go home."

When we reached home, he said, "It is better not to stay in this country now." One week later, we left for Chad. We traveled to a place called Roto, which is still in Sudan. Then, from Roto we traveled to Burgu, which is in Chad. It is seven hours by foot from Roto. In Burgu we stayed five months. There, an organization supplied us with food. I do not remember the name of the organization. There, I delivered a child, my husband's and my child.

A big lorry carried all the other people, about fifteen families, to Goz Amer. Since I had just given birth to a baby, I was not taken on the lorry. My husband remained with me and my baby. We remained there for six months. My husband, my baby, and I used a donkey to carry us to Goz Beida. I was on the donkey with the new baby, and my other child and the child of my husband's brother, and my husband went by foot. It took six days. We arrived in May 2004.

Here in Goz Beida it is better [than in Sudan], but when I remember what the Arabs did to us, I am not happy at all.

I have nothing more to say, but I thank you for coming and listening to my story. We want to explain our stories, but no one comes. Thank you so much for coming and listening. I am pleased to [have] explained my story to you. It's what I wanted.

Yagoub Adam Omer was born in Biroro, Habilla, West Darfur, on November 12, 1969. He is a member of the Massaleit tribe. He has twelve years of education. He is married with seven children. He arrived in the Goz Beida refugee camp on June 6, 2004.

The interview was conducted by Samuel Totten on December 14 and 15, 2009. The first half of the interview was conducted in a small room in the Oxfam Compound in the desert village of Goz Beida. The second half was conducted in the Goz Beida refugee camp inside the interviewee's branch and grass hut that was covered with a tarp. Inside were two beds and two chairs sitting atop a colorful rug only partially covering the sandy ground. Outside the hut, the interviewee's family members—his wife and daughters—prepared a meal, washed clothes in a bucket, and played, respectively.

In the 1980s, the years of Jaffar Nimeri [president of Sudan from 1969 to 1985], we were in the secondary school, and we heard that the Arabs founded an organization called the Arab Association. Previous to this, the Arabs had held many meetings about the status of Sudan. This went back to 1977.

In the 1980s there was a meeting in Khartoum, and Arabs from all of the Arab countries attended the meeting. The meeting was organized by the BAS Party. An engineer from the Zaghawa tribe was invited to this meeting by mistake, as he was assumed to be with an Arab tribe, and this engineer told us that they said: "Sudan is a very rich country in agriculture, animal husbandry, minerals, and petroleum. It also has the River Nile and lots of water. Sudan has all these riches, but much of the land is held by black Africans." Libya was very active in these meetings, as it had a keen interest in the waters of the Nile. In the meeting some decisions were made, and among these decisions was that black Africans should be removed from this rich land and that Arabs should replace them so that they could develop the area. They also said: "If we tried to move all these people at one time, there would be an international crisis, and other countries would become involved in this matter so let's make this appear as a local issue arising from local problems and we will support the local Arabs and deal with one African tribe at a time. Before the local Arabs attack the Africans, insecurity should be created by banditry, looting, the stealing of animals, and killing people. So, this should be a step-by-step process." And this began in 1983. This started in the Nuba Mountains and in villages east of El Geneina.

The leaders of this meeting created a long-term program to force the black Africans from the land, and this program was passed from president to president: from Nimeiry to Swar Aldahab to Ahmad Al-Mirghani to al-Bashir.

At the same time, part of the program involved designating the different Arab tribes with specific roles. For example, six Arab tribes (Taisha, Habania, Rizigat, Ma'aliyah, and some of the Misseria and Houmbur) were assigned to fight in the south to create havoc. And they assigned seven Arab tribes to fight in the Nuba Mountains: Misseria Zourouq, Hamar, Bederia, Hawazma, Kawahla, Kababish, and Jawama. Other tribes were assigned to fight in Darfur: Beni Halba, Salamat, Targam, Mahria, Mahamid, Attawia, Zaydia, Jaml, and Awlad Zid. This plan was developed early [on], but was to be carried out at different points of time.

Al-Bashir carried this program forward, but his specific aim was to destroy the largest, most powerful tribe first, the Fur tribe, and then the second most powerful, the Massaleit tribe, and then the third most powerful, the Zaghawa. No other tribes have significant holdings of land in Darfur. There are six individuals in the Bashir government responsible for implementing this specific aspect of the plan: Omar al-Bashir, Ali Osman Taha, Nafi Ali Nafi, Abdel Rahim Mohammed Hussein, Mustapha Osman Ismail, and Ahmed Haroun.

The attacks began against the Fur in 1988 and continued through 1994. The attacks against the Massaleit began in 1995 and continued through 1999, and then the attacks began in the Zaghawa area in 2000 and continued through 2002.

The first time our village experienced problems with Arabs was in 1995. The Arabs came to a hamlet, Biroro, near our village (the hamlet shares our village's name), where my family kept our animals. We had about 400 camels, and about 140 sheep. My uncle, Abdraman Ishak Yahya, was tending to the animals in the hamlet, and he was killed by the Arabs, along with four other people. My brother, Abdullah, survived because he fled on a horse.

Over the next six months, there were eight attacks in our area. Our village was the eighth to be attacked. Between 1995 and the beginning of 1996, the Arabs stole all the animals in the area. This included the cows, the camels, the sheep, the horses, the donkeys, and the goats. This was more than 15,000 animals, maybe 20,000 animals.

The Sudanese government prevented the police from doing anything—taking down complaints, arresting suspects, jailing the suspects, or trying them. The Minister of Interior, Abdarrahim Hussein, gave such orders to the police. In 1994, he visited Darfur, going to El Fasher, Kutum, Kababia, El Geneina, Zalingee, Nyala and, in an open meeting, he said, "If any black people report incidents, the police should write it up but not follow up by arresting the suspects." In 2002, he returned to Darfur and, in public, said, "Do not even take any reports of any incidents against the black people."

On 15 November 1995, our village was attacked. In the early morning, during the morning prayers, the sun was not yet up. I was at home with my family. I woke up to the sound of shooting of small automatic weapons, the Kalash [Kalashnikov], GEM, *doshkas* [pick-up trucks with a machine gun mounted on its bed], RPGs, small machine guns, and a Chinese weapon called Ten. The attack was on the western side of the village, so we decided to take the children away from the village. My father asked me and my older brother to take the children, five of them, and the women, two of them, out of the village. My father had two wives, and when the hamlet was attacked earlier, one wife, who did not live with us, came to stay with us, so she was there too during the attack, along with my father, mother, sisters, and brother. He told us to go into the sorghum cane field, which was tall, and to make our way to the garden, which had mango and guava trees. My father said, "I shall remain at home to see what happens with the attack." Many men remained in the village for this reason.

As we went toward the garden, we came across others returning to the village because shooting was being carried out near the garden as well. As all of these people were running toward us, a woman, Khadiga Ibrahim, who was running with them with her cows, was hit by a bullet and fell. She was shot in the thigh. Two people picked her up and carried her off, but her cows dispersed.

As we were fleeing, we saw many men on horses attacking the village. About sixty to seventy or more. Their heads were covered with turbans, and some wore the black [sun] glasses. But like I said, the grass was tall

and there could have been many more, but that's all I saw. Behind the horses, near us, were men in two Toyota Land Cruisers (some all gray, some camouflaged) and a Russian *doshka*. Beyond them were many other vehicles, but I was running and didn't see how many there were.

One Antonov [a Russian-made transport plane], all white, flew over quickly and left quickly. It didn't throw fire [drop bombs]. There were also three helicopter gunships. All three were black, and all across their bellies [undercarriages] were painted Sudan flags in the color of Sudan. When the helicopters were over the villages, they didn't shoot, but one helicopter flew over the *wadi*. Many women and children were hiding under the trees, and it threw fire on [fired—shot—at] them. It circled twice and kept throwing fire. I know that eleven people were killed and seven injured. No men were there, only women and children.

We changed our direction and ran down the riverbed of the *wadi* until we reached Magarsa, one hour and fifteen minutes by foot, where my mother's sister lived. On the way, three of our relatives and two neighbors from another village were rushing to our village to help us. After greeting each other, they continued on their way and we continued on our way. When those people reached the village, they were ambushed, and four of the five were killed and one was injured. Those killed were Zakeria, my father's brother; Haran, my mother's brother; and two villagers. They were all hit by GEM. My mother's father, Ishag, was injured by the GEM. During the operation he had later, the doctor removed pieces of the GEM shell from his thigh. He was shot in the right shoulder blade and it went out [exited] his chest, and he was shot in the right front shoulder and it [exited] through his back.

Back in the village, my father began searching for us in the garden, but he could not locate us because we never reached there. He asked people if they had seen us, but nobody had. He remained in the village for two days to help bury the dead and to help the injured people. Including the people in the village and those from other villages that came to help us, forty were killed and twenty-seven were injured. Part of the village was destroyed by fire—about a quarter of it—but our home was not destroyed.

For those two days, we did not sleep at all. We did not eat, and we did not sleep. All we drank was a little milk during those two days. But when our father joined us, we were relieved and we ate again.

My father told us all to remain with our aunt. He then took our grandfather to Zalinga to the hospital.

We stayed for seven days in Magarsa. On the seventh, our uncle came and took us back to the village. All of the people were fearful and unhappy. The tensions continued through 1999 because such attacks continued throughout our area, Dar Massalit.

In 1996, my cousin and I went to Nyala but passed through Zalinga, where I entered the *suq*. As I was looking around the *suq*, I discovered

sixteen of our cows that had been stolen when my uncle was killed. I went to the police, and the police arrested the three men selling the animals. Because we were traveling, we got our luggage down from the bus and spent the night there. We placed our luggage in a restaurant that was owned by the son of the imam of Zalinga, Imam Abdelmoula, and he invited us to spend the night at the imam's house. In the morning, the imam himself went with us to the police, and when we arrived at the police station none of the three men who were attempting to sell our cows were there.

We asked the police, "Where are the men you took to jail?"

They said, "You will find these guys when you go to the judge. We conducted an investigation, and we finished."

Then I asked, "Where are our cows?"

A police officer said, "We placed the animals in the wandering place [grazing area]. When we find animals without their owners, we place them there."

The police then interrogated us, asking, "Where did these animals come from? How were these animals taken from you, and when? How did you recognize these animals?"

After they interrogated us, they demanded money from us. They said, "When you come here to complain, to file a complaint, you must pay us." They took from us 60 Sudanese pounds [about 100 USD]. They were robbing us, and if we did not pay they would not have forwarded the case to the court.

They ordered us to go and get our father and bring him to Zalinga. Zalinga is about 200 kilometers from our village. We returned to our village and brought our father and two uncles back to Zalinga. We traveled by bus to our village and returned to Zalinga on a lorry [a large truck generally loaded with goods on top of which passengers pay to ride to various destinations]. It took us seven days. When we returned to the police station, they asked my father and uncle the same questions they asked us. Then they told us that the next day we must go to court. They said we must first return to the police station in the morning and go to the court with them [the police officers]. When we arrived at the police station, the police treated us like we were the criminals and took us to the court alone. Those who had our cows were not at the police station or the court.

At the court we waited for three hours and a half and then, without seeing us, the judge went for his breakfast. When the judge returned, he told us to leave and return in three days. After three days, we returned to the court and the judge interrogated us individually—we were five. Then he told us to leave and return in one month. After one month we returned, but we were told to return in another month, and this happened to us ten times! This went on for one year and six months. On all of these occasions, we never saw the cows or the thieves. During the last appointment, my father told the judge: "This is not justice. My brother was killed, my

animals were stolen, we found them and went to the police and court, but there is no justice." The judge took the pages of the case, ripped them in half, threw them in the trash basket, and said, "Go find justice where you think there is justice."

In 1997 I cannot tell you anything about Darfur because I was in the south [south Sudan], in Juba. Before I was born I had an uncle who moved to the south. In 1997 he died and left two children. So I traveled to the south to fetch the children.

In 1998, the attacks by the *Janjaweed* continued throughout the area. The *Janjaweed* carried out the attacks, but behind them was the Government of Sudan [GoS]. In one village, Mermta, my uncle, Ishak Yacoub Souleiman (sixty-five years), and his son, Ismail Arab Souleiman (forty-four years), were killed in an attack. I cannot remember the month.

That day there was an attack, and they put fire to seven villages. The son had slept in another village with his second wife, and when he saw the attack on his village he rushed toward it, but before he reached it he was killed. He saw the horsemen coming and he hid in some bushes, but he was discovered and was shot and killed by them.

My uncle was at home when the attack began and immediately led his animals out of the village to the *wadi*. He asked his relatives to take the animals behind a [nearby] mountain, but they didn't succeed because the attackers stole the animals. There were more than 300 cows, four horses, and seven camels used to press oil. And three donkeys. Very special donkeys (*roufawi*). It's between a horse and a donkey and is very fast. It's larger than a regular donkey and smaller than a horse. My uncle, who was very rich, returned to his home where he also had a shop, as he was a trader, and pulled out his money [over 30 million Sudanese pounds], and stepped out on his verandah and was shot and killed immediately.

I fetched the orphans, and they have lived with me and my family up to now. The boy was fifteen and the girl was twelve. The boy is married now. He is a man.

I had family in many villages, and many family members were killed and injured. This was all in '98.

At the beginning of 1999, the GoS gathered the traditional leaders (the Sultan, *shantays*, *umdas*, and *sheiks*) from West Darfur and beyond, including the Sultan of the Massaleit, Abdrahman Baharedin, and took them to El Geneina to try to reconcile our differences.

Representatives from other areas in attendance were: Fadul Sesi (the *dimowai*, head of all *shantays* of Fur in all of Darfur); Adam Riga (the *magdom*, head of all the traditional leaders—except the sultan—in Nyala); another man whose name I do not know (the *shantay* of Dajo); and one more man whose name I do not know (the *shantay* of the Birged tribe).

Those Arabs from other areas in attendance at the meeting were: Ali Dabaka (the nazer of the Banihalba tribe); Beshara Ali (the nazer of the

Taisha tribe); Semani (the nazer of the Fulani Tribe); and Issa Mahmoud (who represented his brother, Ibrahim Mahmoud, the nazer of the Rigyat).

The man who was responsible for calling this meeting was a general in the GoS, Mustapha Dabi. At the meeting, which included the Governor of West Darfur and the Director of Police, it was stated: "From this day forward, no villages will be put to fire." This was not a meeting for negotiations but a declaration and a message to inform the people whose villages had fire put to them that there would be no fire anymore.

As they were holding this meeting to call off the attacks on the Massaleit, they were just beginning the attacks on the Zaghawa. The [black] Africans did not know this was the plan; and even if they did, they could have done nothing about it.

Immediately, in 2000, the attacks began in the Zaghawa area. The Zaghawa are known for being camel owners, and the Arabs began stealing all of their camels.

Between 2000 and 2002, the government [GoS] began distributing arms to Arabs all over Darfur. We saw *Jesh* vehicles traveling to Arab hamlets and distributing weapons. When we asked the Arabs why such vehicles were in the area, they said, "They are doctors looking after sick animals." We also saw helicopters landing in Arab hamlets, and we were told that these planes and helicopters also brought animal medicine. At the time, I did not see the type of weapons [being off-loaded], but immediately we saw the Arabs being trained by the *Jesh*. Part of their training involved shooting at targets [target practice]: practicing with the Kalash [Kalashnikovs], GEMs, *hauns* [front-loading weapons that make a whoosh-like sound when fired], and *grenous* [machine guns]. They were also being trained on *doshkas*. They would place the *doshkas* in cement so that it was fixed in one place atop an iron bar that allowed the weapon to swing back and forth [versus being attached to the bed of a truck, as it usually is] for practice.

Beginning in May 2003, the government [GoS] began distributing weapons openly in the towns of Zalinga, Garsila, Forbranga, Habila, Sarhfoumra, and El Geneina. This was in West Darfur. In North Darfur and South Darfur, they distributed weapons there, too, but in which towns the weapons were distributed there, I do not know.

The training involved many, many people. What astonished me when I saw this training was that the number of people being trained was in the thousands, [whereas] the actual number of Arabs in our area was only a few hundred. Many of these Arabs came in from other countries: Chad, Niger, Cameroon, Mauritania, Libya, Tunisia, and Algeria.

These people, who were being trained, would come to our village sometimes to purchase goods. I wish to tell of a particular case [regarding] my personal contact with them. I had a large garden near the road, and one day some trainees came in three vehicles. One vehicle got in an accident and turned over, and three of the passengers [trainees] died, [while] others were

injured. We rushed to help them, and those I spoke [with] in the other trucks were Algerian. Those people who were injured had their shirts removed, and when some of them died they [their colleagues] carried them away but left behind their shirts that were covered with blood. Because these shirts with blood were in my garden, I grabbed them up to throw them out, but as I did so I noticed that there were some cards in the pockets of the shirts. I pulled the cards out of the pockets, and I discovered that one of the cards was a Libyan National ID card. There was also a list of names of people with different nationalities—some from Chad, some from Libya, Niger, and Cameroon. We brought the ID cards and the list with us to Chad, and when the ICC [International Criminal Court] officials visited us here, we turned them over to them.

Nine days before our village was attacked, six neighbor[ing] villages were attacked and destroyed. The names of the villages were: Diliso West, Diliso East, Sudog, Salka, Sala, and Amdra Biro. The closest village was forty-five minutes by foot [from his village], and the farthest village was three hours by foot. These attacks were carried out by the government and the *Janjaweed*, and there were Antonovs.

Even the smoke from the fire in the other villages passed over our village. We could also see the helicopter gunships flying above the villages. The helicopters armed the *Janjaweed* and the *Jesh*, and as they flew overhead they shot at people on the ground. We could hear clearly the dut . . . dut . . . dut of the shooting.

We could see Antonovs circling above the villages. And we could hear the sound when the bombs hit. When the fires started, we could see the red color of the flames. Four of the villages were destroyed totally, only ashes were left, and two were partially destroyed. In the villages that were destroyed totally, the *Jesh* and *Janjaweed* stayed there, and no one could bury the dead. And I think those dead bodies are not even buried to this day.

When the attacks started, we rushed toward the villages to help our family and friends, but when the attacks continued coming toward us, toward our village, we ran back to our village in order to collect our things and run away. We collected the children and all the light items [e.g., clothes, money, blankets] we could carry. We traveled to another village, Magarsa, about one hour and fifteen minutes by foot. Old people and those who were sick were put on the few horses we had, some were pulled in carts by horses, some were carried on beds [stretchers made from tree branches, twigs, and vines], and some were even carried on the backs of relatives.

Many of those whose villages were attacked also came to Magarsa, and joined us. The newcomers numbered thousands.

The following day, all of the men (eighteen years and older) from Magarsa, my village, and those villages that had been attacked, left to bury the bodies of those killed in all of the villages. We only made it to the first two villages because the attackers remained in the other four villages.

In each case, we sent three men ahead to see if it was safe to approach the next village. This method worked well for the first two villages, but for the third it didn't. The men were captured and killed. We heard shots, and we assumed that the three had been killed. We left immediately and returned to Magarsa. In the first two villages [combined], twenty-eight were killed—men, women, and children. The injured we took to Magarsa numbered nineteen, but others injured in the first two villages were taken to Habila. The number of injured who were taken there, I do not know.

We stayed in Magarsa two more days, and then the men returned to our village. To secure those goods we could not carry (bags of grain, cooking equipment, iron beds, most of the clothes), we dug holes and buried it all. What food for the children and the women we could carry, we took back to Magarsa. Our village had not been attacked at all, but we still didn't feel safe there because the attacks were still ongoing. The next six days we stayed in Magarsa. On the sixth day, six men and nine women returned to our village. Some were those who owned heavy items [e.g., the mill floor, oil-pressing machines, generators, a shelling machine for groundnuts] and had arranged for vehicles to carry them [the heavy and expensive items] off for protection. Others also returned to our village to obtain more food to carry to Magarsa, and some returned to get all of their personal items to carry away. All slept in the village that night.

Early in the morning the attack came to our village, [at] about 5:30. It was still dark, but I was already awake because I had an oil-pressing machine that was being taken away and I was taking it apart. Suddenly, we heard shooting coming from another part of the village: Kalashnikovs, GEMS, RPGs, *doshkas*.

Five people in another part of the village who had a flour mill and an oil-pressing machine were attacked by surprise. Two were killed, and the three others ran to our part of the village and informed us that we were being attacked by the GoS and *Janjaweed* on horses and camels. They said they thought it was better to run away. So we started running out of the village, heading towards Magarsa. As we were running out into the darkness, many GoS' *doshkas*, which were sitting on a high place [a small hill], turned on their headlights and shined them on the villagers. As the villagers continued running, a *doshka* started shooting at the villagers caught in the lights.

When we reached the outskirts of the village, we saw two Antonovs and two helicopter gunships. The Antonovs were dropping bombs, and the helicopter gunships were shooting. One Antonov threw twelve bombs, and the other threw twenty-four. We were running and we were watching the planes and counting the bombs. We continued running until we arrived in Magarsa. The next night, some went to bury the dead. We never returned to our village. We abandoned our flour mill floor and our oil presses and all the goods we buried because the Arabs were still roaming the area.

We hoped this would be the last attack and that Magarsa would not be attacked. We felt there was no other place for us to go.

One month later, in October 2003, Magarsa was attacked. The attack on Magarsa was different. In most attacks, the attackers came from one or two directions. But the attack on Magarsa, they came from all directions.

The sun was just coming out. I was awake in the shelter that I had built and we were living in, and the first thing I heard and noticed was that an Antonov was circling. Then two helicopter gunships arrived and began circling. Next I heard vehicles coming. It was only then that I heard shooting. People began running in all directions, all except the north because in the north there were no villages since they had all been destroyed. As we were running, we had no choice but to cross the attackers [the *Janjaweed*, the GoS' vehicles, the *doshkas*] because they were everywhere. I ran carrying one child, and the other children followed, and my wife, too. My wife ended up running in her own direction, and we lost [track of] her. The people scattered everywhere and some did not find their children until here [in Goz Beida]. Other children ended up in IDP camps in Sudan. It was so noisy, loud, and frightening, and we, the villagers, were everywhere, running this way and that. Horses were galloping everywhere, and all the time there was the shooting and the bombing. Till this day there are some who are mad [crazy], especially women who saw their husbands and children killed in front of them. Forty people were killed, including seven elderly [who] were killed by fire as fire was put on the village. The number of injured were so many I don't even know today.

We fled to a village called Kigno, two hours on foot. After traveling six kilometers, my wife joined us. On 18 December, this village was also attacked. On this same day, the *Jesh* and *Janjaweed* attacked and destroyed ten villages—to the ground, ashes.

In Kigno we lived in a primary school, Kigno Primary School, where we lived in a classroom. The attack there came at 4:30 in the morning. I was asleep. It was very dark.

I woke up to the sound of the shooting. When we ran out of the classroom, the school grounds were full of people running and screaming. As we ran, we were surrounded immediately by swarms of people and I ended up only with my child, fourteen months. My wife was lost in the crowd with the two other children. The middle child, Sagda, a girl, thirty-two months, was on my wife's back and was hit in the head and killed. There were some men near my wife, and they picked up the dead body and some distance away, where it was secure, they stopped and buried the child.

I headed directly for Forbranga, carrying my baby. It was three hours on foot. More than a thousand people were fleeing there. We stopped for three days in Forbranga. On the third day, after friends from Forbranga gave us money to hire a vehicle, we paid for a trip to Daguessa. We arrived in Daguessa on 23 December. In Daguessa, for the first three days, we stayed

under a tree. Then we collected wood [from trees] and made a shelter. After one month, Doctors Without Borders arrived and gave us medicine and plastic to place over our shelters. We remained there until 24 April. On 24 April, UNHCR and CNAR [Committee National Pour Accueillir Le Réfugiés] arrived and transported us to Goz Amer [a refugee camp in southern Chad, near the Chad/Sudan border]. We remained in Goz Amer until 6 June 2004, and we were brought to Goz Beida. In Goz Amer we remained the entire time under a tree. The UNHCR camp at Goz Amer was already full, and we were told that only people who remained in Goz Amer permanently would receive a tent. We were told that UNHCR was building a hospital and providing water in Goz Beida, and when they were ready we would be transported to Goz Beida. It rained many times there [Goz Amer], and we covered ourselves with the plastic given to us [earlier] by Doctors Without Borders. There was water. Vehicles [trucks] with tanks brought water into the camp.

After arriving at the reception tent in Goz Beida in the evening, we received milk and biscuits. In the morning we were provided with a tent by UNCHR [a large tent one can stand up in], which we had to erect. Those who arrived before us helped us erect the tent. The best tents lasted for two years, but some only lasted for eight months to a year. They were very old and could not resist the sun. At that time, if your tent ripped it was sometimes replaced. We were lucky because our tent was replaced, but many didn't receive a [replacement].

After 2007, they [tents] were not replaced. After the second tent was no good, we asked for another one but were denied by UNHCR. We then had to build our own abodes and cooking areas. We had to build our own homes out of sticks and straw and plastic and cardboard from boxes that held cooking oil supplied by the U.S. and other donors.

I built my compound on the land where the tent had sat, and built it step-by-step. It took me two years.

No UN tents from those days exist anymore. All have built their own huts, houses, compounds.

I do not think it's good that tents are not provided. If you are strong it is okay, but those who are elderly and weak or who are women whose husbands and children were killed and are not strong cannot easily go out and forage for wood or build their own huts.

The most difficult aspect of living here [in the refugee camp] is the local Chadian authorities and their form of justice. Whenever there are any problems dealing with refugees who are Massaleit, I often deal with the Governor, the police, and other local authorities. [This is true due to the fact that the interviewee is an *umda*.] For example, if a refugee works for a local person and is not paid, then we go to the Chadian authorities, the court. [Generally,] no solution is provided, and the refugee ends up with no money. In fact, whenever there is an issue or problem between a refugee and a Chadian, there used to be no justice at all.

UNHCR was informed of this situation, and [as a result] it approached the Chadian government and told the officials that the human rights of refugees must be honored. It also told the government that an internal office for protecting human rights must be established. Such an office was established fifteen months ago. It has helped greatly, as it follows up on all the problems, and if it can't solve a problem it reports the problem to other organizations, including the UN, and then, again, the UN speaks to the Chadian government.

We still have a problem here of education. When we came here there were no schools, so we established our own schools. Later on, UNICEF came to help educate our young people. But the educational programs only go through primary school. After that there is nothing for our students. There is no place for students to go once they complete primary school. So each year we have young people who graduate from primary school with no options. We have asked UNHCR to establish a secondary school but have received no answer.

UNHCR told us that the Chadian curriculum is different from the Sudanese curriculum, and thus they went to the federal government in Khartoum to speak to the authorities about establishing a secondary school here. In doing so, UNHCR asked the authorities in Khartoum about the possibility of allowing students to sit for the final exam so they could earn their diplomas and have them recognized [in Sudan]. But the Sudanese government refused to consider such an option. It even refused to send books for the students.

We told UNHCR that we didn't need the Sudanese curriculum, as students in southern Sudan are studying a Kenyan curriculum. We told them we'd accept a Chadian curriculum, a curriculum from Cameroon, or even a British curriculum, but we have received no response.

UNICEF says its focus is children only, and not older students. We have about 600 students ready to study at the secondary level. There is a need for three branches: mathematics, science, and arts (economics, history, political science). That means that there would also be a need for fifteen to twenty teachers. Now, without such a school, the students have nothing to do but stand around. Literally nothing!

GTZ, a German organization, established a vocational school to teach older students carpentry (making tables and chairs) and construction (building homes), mechanics (to repair motorcycles), small industry (to make soaps and to color clothes), but upon graduation there were no jobs, so those students have ended up standing around as well. Only Chadians are allowed to work in Chad. And our young people are not allowed to travel to, for example, Cameroon or Central Africa to find work if they don't have the proper documents, and no one will give them documents.

The worst thing about being a refugee is that you lose value as a human being. Whenever you, as a refugee, ask for your rights, you don't receive

them. Even if your country chases you away, the international community has a responsibility toward you. But when you ask the international community to help you gain these rights—rights it established for everyone—it does nothing to help you. Those people who you approach or travel to the land of, they don't consider you a human being, they just despise you.

Also, goods that were donated for us as refugees, goods we need [milk and biscuits for children, special slow-burning stoves for cooking, school supplies] have ended up in the local *suq*, and thus we must go to the *suq* and purchase those items. These were items donated by UNICEF (for example, special exercise books) and Germany (such as stoves), but they were stolen by the Chadians and sold in the local *suqs*.

The international community has tried to solve the problems in Darfur, but the African Union has tried to push the international community away. The African Union has never solved any problem in Africa.

The problem of Sudan can be solved with the arrest of Omar al-Bashir or without the arrest of al-Bashir. [Nevertheless,] Omar al-Bashir must be judged.

A couple of months ago, the Sudanese government conducted a census to [ascertain] how many people of each group were living in Sudan. Khartoum distributes funds to the different groups based on the numbers of people in each group, but since so many Darfurians were in refugee and IDP camps, the number of Darfurians was [grossly] underestimated. This is not justice! The UN must take this issue in hand and solve it. It must also take in hand the problem of elections. When you have a people such as us who are outside their land, how can we solve it? We can't! So the UN should take it in hand.

To solve the problems in Sudan, there must be a transitional government composed of all groups. And then when there is an election, the group that wins the election can take the power.

Not only al-Bashir but all who committed crimes should be tried by the International Criminal Court. Still, the arrest of al-Bashir alone will not automatically solve the problems of Sudan.

Daoud Abdel Rassoul was born in Oroum, West Darfur, in 1967 (month and day unknown). He is a member of the Dajo tribe. He has eight years of education. He is married with eight children. He has been in Goz Beida refugee camp since November 2003.

The interview was conducted by Samuel Totten on December 15, 2009. Hussein Idriss served as the translator. It was conducted in a fellow umda's compound in the Goz Beida refugee camp.

In 1977, Arab herders, nomads, stole our animals. I was only seven years [old], but I looked after the animals. Our home was full of sheep, goats, and cows. I remember this because it was the first time we were without milk. All the villagers, including my father, chased after the thieves, and two villagers were killed by the Arabs.

The thieves got away with all of the animals. My father and others went to the police, whose head was Arab, to complain and asked the police, "Why did you not chase the thieves? You knew they stole our cattle and saw us chasing them, and you stayed here and did nothing." The police then beat my father and the others. After the police beat them, the police ordered them to pay fines, and when they refused the police searched their pockets and took all the money they had.

In 1989, we had camels in the village and nomadic Arabs stole those animals and all the camels in the village. Between fifteen and twenty. About fifty villagers chased the thieves, and three of our people were killed. The Arabs had arms (Kalashes, GEM, and Ditriou, a type of machine gun). Our people had none. Again, our people returned without the animals, the camels.

At this time, many Arabs began arming themselves, but we didn't know that. The government helped them, and the Arabs went out and stole animals from our poor people and then divided them up among themselves. This was the time of al-Sadiq Al-Mahdi i¹¹—only months before Omar al-Bashir overthrew al-Sadiq Al-Mahdi i.

When al-Bashir gained power [which he did in 1989 by carrying out a *coup d'état*], the first thing he did was to stop the sugar from reaching Darfur. Sudan has the second largest sugar company in the world, and each state received a quota of sugar below the world market price. When al-Bashir overthrew the government, he cut off the quota to Darfur, and for many months we did not drink tea because there was no sugar.

He not only cut off the sugar, but many other things: funds to build mosques, schools, and hospitals; funds to build roads and bridges; and all other types of development projects in Darfur. Khartoum would force Darfurian students, from sixteen up, to go fight in the jihad in the south. The government would tell the students that the people in the south are godless and that they had to go fight them. But the Arab students they sent to the best universities in Khartoum, Egypt, Great Britain, Qatar, and Saudi Arabia to study [versus to the south to fight in the jihad].

In 1991, the Arab Gathering, a very big group, came to destroy our villages in Darfur. Because the Arab Gathering's program was to fight all Africans, they attacked whether there was a conflict or not between the Africans and Arabs.

This group attacked our village and killed eleven people. It was the largest attack against our village to that time. There were about 100 attackers.

¹¹ In 1966, at the age of thirty-one, al-Sadiq Al-Mahdi i became Sudan's youngest elected Prime Minister, but his government was overthrown after nine months. Subsequently, he was detained for several years and then forced into exile, by the Numeiry regime, until 1985. In 1986 he was once again elected Prime Minister of Sudan, but was overthrown in a coup engineered by Brigadier General Omar al-Bashir on June 30, 1989. He was placed and kept under house arrest until he made an escape to Eritrea in 1996. He is currently leading the Sudanese opposition in exile.

The attack continued for a full day. Many people fled the village, but some remained to fight, using spears, sticks, and bows and arrows.

When the Arabs attacked the village and killed our people, villagers reported this to the police. The police said, "You are still complaining?" It meant "You should stop complaining and forget about it."

In 1991, the Government of Sudan called the heads of the Arab tribes together in El Geneina, and afterward the heads formed military training camps for young Arab men. They trained them how to use weapons (Kalashnikovs, GEM, Diroov, and *doshkas*). Zubair Mohammed Salih, the vice president of al-Bashir, visited the training camps, spoke to the trainees, and provided them with funds and arms. I saw this man in Habila, and heard him as he talked to all the people there. The talk was given in an open area, near the *suq*, on a football ground. When he spoke, he always addressed us all as "My people . . . my people," but as soon as he left, the Arabs always attacked.

The attacks continued up to the time we fled there. They would steal our animals, threaten us, kill us, and send our educated students studying at universities in Khartoum to fight and die in south Sudan. From that time on, the government changed its system. In the past, the government would meet with the traditional leaders, black and Arab, but it began to meet with each group separately.

Our village, between 2002 and 2006, was attacked three times, but they [the *Janjaweed* and *Jesh*] could not destroy it because it was defended. It was defended by God. They could steal the animals, but they could not destroy the village.

We are honest people and do not take anything that is not ours. We are a religious people, and we asked God to help us and He did. Our imam, all the time in the mosque, asked God for help. All the other villages around us were destroyed, but not us.

In August 2003, our village was attacked by horses, camels, vehicles [Land Cruisers], *doshkas*, majarous [armored carriers], and planes [Antonovs and helicopter gunships]. The attack came in midday, about one o'clock in the afternoon. I was out of the village, but my brothers were inside the village, and so were my wife, children, and mother. I arrived that night and helped bury the dead. Many people were killed—forty people, including my uncle, the imam, Mohammed Saboun, one brother, Ibrahim Abdelrassoul, and an uncle from my mother's side. Two of my sisters' sons were also killed. When I arrived, no alive people were there. Only the dead. The others were chased away like dogs.

Many of the people who fled during the attack I did not see for many years. The people dispersed to many areas. Some fled to Chad, some fled to Mornei, some to Habila, and some to Kalma camp. Years later some came to visit relatives here [the refugee camp in Goz Beida], and only then did I see them again.

I didn't see my brothers for four years. They visited me here. I am responsible here [as a result of being an *umda*], and when you are responsible here you cannot go to Sudan. They [Sudanese government officials] know that many people with the UN and other organizations speak to me and [that] I give them information, and if they saw me they would kill me.

After burying the people, I fled to Chad. After I left the village, I met some people and asked where my family was, and they told me my mother, brothers, and sisters fled in the direction of Mornei and my wife and children in the direction of Chad. I traveled toward Chad, and I met my wife and children in a village near our village. It took some of us eight days on foot to get to Chad, and others it took fifteen days. Some of the old people could not travel quickly, and they took longer. Some even died on the way from hunger and thirst. We arrived in Modaina, where we remained for five months. The Chadian people received us well and gave us clothes and some grains and built some small huts for us. Then an organization, UNHCR, came for us and brought us directly here to Goz Beida.

When Moreno-Ocampo [the International Criminal Court chief prosecutor in charge of the Darfur case] reported to the UN what had happened in Darfur, the UN read it and put it aside. The National Congress Party continued to kill Darfurians all over Sudan. Then, in November 2009, the Sudanese Ambassador to the UN, Abdel Mohamoud Abdel Halim, declared to the UN that Ocampo had failed. When we heard this declaration, we felt defeated.

As a U.S. citizen you should put pressure on [U.S.] President Obama to take this problem in hand. Obama is now keeping silent about Darfur. When the American government says anything, all the people all over the world take it seriously, so Obama needs to speak and take this in hand.

Since we've been here [in the refugee camp], we have spoken with more than 1,000 important persons, and we told them that Omar al-Bashir and the National Congress Party [NCP] are dangerous for Sudan and should be removed. This is the message I wish you to convey to Obama. Obama should know that Omar al-Bashir said that the international community and the International Criminal Court are under his shoes.

Ibrahim Musa Adam Musa was born on September 11, 1971, in Kuranga. He is a member of the Fur tribe. He has thirteen years of education, including one year at the University of Khartoum. He is single, and resides in N'djamena, Chad. He first arrived in N'djamena on September 29, 1992.

The interview was conducted in English by Samuel Totten over a three-day period (December 17, 19, and 20, 2009) in a room at the Chez Wou Hotel in N'djamena, Chad.

When I was five years old, my father took me to primary school in Julduw because he did not want me to go to Koranic school. My elder sister went

to school in Julduw before me. She went to the girls' school. There were two schools there, one for boys and one for girls.

[Ultimately,] my father decided that I was too young to live in a boarding school, and he and other villagers built a new school near Torro, where my father owned a farm and an orchard with orange trees, mangos, guavas, papaya, watermelon, and such vegetables as onions, garlic, carrots, and tomatoes. I started school there as if I had never gone to school, as if I had not already studied for two years.

As I was growing up, I heard about attacks by Arab nomadic groups. My father, my mother, my uncles used to say, for example, "Five years ago, we were attacked and cows in our village were stolen." Such attacks continued during my primary years. When I was ten years [old] and in primary school, fourth grade, there was an attack on our village. The attack was about eleven in the morning. I remember it was vacation, at the end of the rainy season. It was in the morning after the cows had already been taken out [to pasture] and brought back in to be milked.

We were on the other side of the village, and we heard shouting. We ran toward the village to see and we came across some villagers, and they told us there had been an attack and the Arabs were shooting *gravinas* [a type of weapon]. I didn't know what *gravinas* were. Everyone was in a panic. Some were running, other were trying to find their family, some rounded up cows and even the calves.

We, my friends and me, were so young we kept running toward the shooting. When we reached the area, we saw the Arabs, who were still shooting and stealing our cows, the cows of the whole village, thousands of cows. Our people have a custom that all of our cows should be kept together in one part of the village, and the other side was to be used for farming. There were also goats, but they [the attackers] only took the cows. Our, my family's, own cows were about sixty.

We just stood laughing. We thought there was a ceremony because in our culture when there are ceremonies, the sheiks shoot off their weapons. They put a bullet in the weapon and shoot it, and then put in another bullet and shoot it, to show off their power. So we wondered, "What is going on? Some people are holding a ceremony while others are in a panic."

Later, only when we saw villagers following the tracks to where the animals had been taken, we realized that our animals had been stolen. We saw our people leaving on camelback, horseback, donkeyback, and on foot and with guns in search of the animals. They found some cows, young cows [calves] who could not travel far, and some older cows, but to this day some cows never came back [were not found or recovered].

During these years, there were many attacks. I remember that there was one village that had all of its cows stolen when they were out to pasture.

For intermediate school (grades seven, eight, and nine), I attended Neyrteyey, and my headmaster was a member of the INF [Islamic National

Front]. My headmaster began inviting me to lunches and dinner when I was in grade seven, and treated me well. He also noticed and commented on the fact that between grade seven and grade eight, I was first in my class. He told me he greatly appreciated my effort and work, and he gave me awards publicly. He did the same for the top person in grade eight. Then, when I was in grade eight, he appointed me as the administrator [overseer, basically] of all the students in the intermediate school. I was happy to do this. Not only in my case, but students all over Sudan do this; that is, a top student is selected to learn how to gain administrative skills. Also in grade eight, he asked me, "Why don't you become a member of the Islamic society?"

I said, "What do you mean? We are already members of Islamic society. I was born in a Muslim state."

He said, "No, no, that's not what I mean." So, he began explaining how there was a communist party and the El Ulma Party, and he mentioned another party; it could have been the Democratic Party.

Eventually, and emotionally, I became a part of INF and learned all about the Brotherhood,¹² and how it was formed in Egypt and how it was founded by Hassan Al-Banna, and how they wanted to make the people happy and be able to enjoy the resources of the country [Sudan] and make everyone equal under Islam, but not like the communists were [supposedly] suggesting. INF claimed that the communists were out to corrupt our society's values. They were [purportedly] doing this in various ways, for example, by not holding people responsible for adultery. But INF only looked and talked about the negative aspects of communism. [But the point is, this man] was my headmaster, and out of all the students he picked me out.

The INF created activities for the students. It was called the Koranic Association. It arranged picnics and assemblies around Islamic issues, and if there was an Islamic conference or they wanted to have an INF leader come to town to address the people in terms of Islamic agendas, the students would help prepare for such meetings and help protect the leaders. I didn't know, at the time, why people hated the Islamic leaders so deeply, but some people would throw stones at the leaders while they were speaking to crowds. But, of course, it has now become clear [laughing at the thought] because they [the Islamic leaders] were hypocrites. They call on people to do certain things but they, the leaders, don't even do them. They claim they are doing them, but in fact they are not. They were creating equality only for a small group, for those who led the society, for those who were in power, for those who were from northern Sudan, for those who were mainly in three tribes: Shaiguia, Danaguila,

¹² The Muslim Brotherhood was founded in Egypt and has been active in Sudan since 1949. The objective of the Muslim Brotherhood in Sudan has been to institutionalize Islamic law throughout the country.

and Jaalia. All three claim to be Arab tribes, but only one of them is a true Arab tribe, the Jaalia. The Shaiguia is an African tribe that was greatly influenced by the colonists, and when they, the Shaiguia, began intermarrying with Arabs their skin turned lighter red, but you can still find black ones. Same with Danaguila. But today they all consider themselves Arab, *only* Arab. They got an education early on, they intermarried, they did this during the opening of colonization so they were at the front gate and got through before everyone else.

When I was in high school I remained with the INF, but in high school there were not so many activities. During this time, in South Darfur, there was fighting between the Arab and Fur. The Arabs kept attacking the Fur, and the Fur attempted to repel them. Every week we heard that villages were attacked, that people were killed in the *suq*, and this shocked me.

This was when Al-sadiq Al-Mahdy was elected president of Sudan. In 1986, he was the chairman of the El Umma Party (the People's Party), and the majority of his votes came from Darfur. Because he was elected by the El Umma Party in Darfur, he should have protected the people of Darfur. But when the attacks against the black Africans of Darfur by Arabs were carried out, Al-Mahdy did nothing. And this was when I began to question the INF.

During this time, more than 1,700 Fur villages were burned—some totally destroyed, some partially. Me, I saw one totally burned down. In 1987, I was traveling to Zalingei to secondary school. I was going by lorry. On the way, I saw a village called Madil Bassy totally burned down. There was not even one hut that remained [standing]. It was all ashes. I asked myself, and I asked others, "Why is this village burned down like this? Where are the people?" And the others, who had traveled these roads frequently, said, "The Arabs attacked this village, and many others." I didn't know why such attacks took place. I asked others, but no one had an answer at that time. This [inflamed] my concern and doubt about the INF.

The attacks continued in 1988. They were even more brutal. The offensive attacks became everyday incidents. In 1988 was when the Fur began buying and collecting weapons for themselves. Collectively, they did this. Those who had villages burned down, once and twice, and even those whose villages were not burned down yet, began purchasing and collecting weapons.

In 1988 or 1989, I was deeply [and] personally involved in helping the wounded peoples in the villages who were victims and those who tried to defend the villages. The government at this time would send forces to the village where the attacks took place, but the forces wouldn't help the villagers but [rather] the attackers. In fact, they'd arrest the villagers for having guns, even though they were just using them to defend themselves in trying to resist the attacks. And if a villager was injured they were arrested, and this happened to one of my uncles.

I found out that my uncle was wounded and in jail and I was able to take him to a hospital. When I prepared to take my uncle from Zalingei, where

they could not operate on his knees where he had been shot, to Nyala, police were sent to accompany us on the bus. I was the one who paid for the tickets of my uncle, me, and the policeman. When we arrived in Cass, a town midway between Zalingei and Nyala, the policeman forced us off the bus and he took us to the police station. I said, "What are you doing?"

He said, "My orders are to take you both to the police station."

When we got there, they put my uncle in prison. I realized that they had no plans to let him out and that he might die there, so I went to see his senior brother. He was in Nyala. He owned a bus and drove us to Cass. Once there, he said, "You must return to your studies," so he dropped me off with three [Sudanese] pounds and I returned to Zalingei.

He went to the police station by himself and discovered that his brother had been taken to a Jordanian hospital in Cass. The *shartay*, head of all *umdas* and sheiks, heard about my uncle being wounded and in jail, and he saw to it that he was taken to the hospital, where he was guarded by a policeman. Later, I learned he was operated on, and once he was better he was taken to Nyala, where he was judged, fined 3,000 Sudanese pounds, and given two years' jail time. He spent a year in jail. After al-Bashir carried out the military coup, the leaders wanted the two groups to reconcile, and those who had been jailed as a result of the conflict were released. The government also said it was taking the weapons away from both groups, but in fact, it only took the weapons away from the Fur.

Among the other things that helped motivate me to think about these issues clearly—about who should be the ruler, what the normal civil rights for citizens should be, why the government treats its citizens in the way it did, including treating some well and others poorly—was an event that took place in a remote village called Danbar in 1989. It is close to an area in which a tribe of Arabs called Habbania reside. I was visiting Khartoum and heard that this village was attacked, and [that] after three days of fighting the Fur in the village [Danbar] ran out of ammunition and every man was killed. The people said they buried more than 283. But there were more than that—those who had been injured and escaped but died. There were also the women and children who were killed. The only two men who survived were two who had snuck out of the village in an attempt to locate more ammunition. There were four fellows who were from that village, and they received the news first about the incident and informed us about it.

When I heard that story *that* is when I started thinking about the need to give up dealing with the Islamic Society and any association with the Umma Party. I felt at the time that something was missing in the whole mechanism. But this was not yet the time I decided to join the SPLM [Sudan People's Liberation Movement].

In 1990, I personally met with Daoud Yahya Bolad, a very intelligent and charismatic and brave man, one of the prominent figures in the INF. He had been thrown in jail many times while protesting at the university

in Khartoum. He had his nails pulled out with pliers. At that time he was holding the security portfolio for Darfur. He was one of the members of the Forty Person Council. He then realized that the government sent weapons to Darfur and gave them to Arabs, only, but not to anybody else. He had not known about this. Had not been informed about this. So, he traveled to Khartoum to discuss this matter with the chairman of the INF, Hassan Abdallah al Turabi. Turabi refused to meet him, and [thus,] Daoud Yahya Bolad traveled outside of Sudan to meet with Ahmad Ibrahim Diraiqe.¹³ Before doing so, he talked to us, the young people, many times at different occasions, at births, marriages, and told us of the many difficulties we were likely to face in Darfur in the years to come. I became a supporter of Daoud Yahya Bolad even though he did not have a specific party at that time.

During my first year at university, the University of Khartoum, I received a message from Daoud through a third party asking me to meet him at Juruf Ambaray to guide he and his men to inside Marra. Their plan was to settle there, bring arms, and start a revolution. I was waiting and waiting and waiting, and then I discovered that they had been confronted, dispersed, and defeated southwest of Juruf Ambaray. I waited almost a month and a half, then I met some of the fighters who had been arrested and put in a prison in Zalingei and Nyala. I was informed that all of the leaders had been killed.

Daoud was not even transferred [to a jail or prison] but [was] killed in the same place where he was captured. He was turned over to the Arabs and killed in Sabisay. His body was thrown into this animal's hole, a big animal that digs a hole larger than even a wolf can enter.

Some were killed in Garsila, some in Zalingei. Just killed, never judged in a court. So, I decided to go back to Khartoum. First, I went to Nyala. The military there had a celebration over the defeat of what they called "the rebellion from the south." It was held at the military garrison. During the celebrating, they shot their weapons wildly, even accidentally shooting themselves. After two days in Nyala, I left for Khartoum.

After I reached Khartoum, I discovered that security agents were searching for me, both in Khartoum and in Darfur. I found out that someone in the INF had passed information to the government that I was supposed to take the rebels into Darfur. So I left the university, and went into hiding in a shantytown where our people live. I was there for about twenty-five days when I got news that the security agents were searching for me at the university. This was in July '92. So I returned to Darfur by lorry. First to Nyala. Then I took a lorry to Murtagelo. Then I went to a village of my uncle, Kalo. After a week, I went to Neyrteyey and proceeded to Zalingei,

¹³ Diraiqe, the former governor of Darfur, who became a rebel leader, heading up the Sudan Federal Democratic Alliance, which represents Darfuris of African descent.

where I only spent one night and then went on to El Geneina, and from there I went on foot to Adre, which is in Chad. From Adre, I took a big truck to Abeche [a major town in eastern Chad, close to the Chad/Sudan border]. In Abeche, I came down with malaria and stayed there for fifteen days. I then traveled to N'djamena by truck. It took six days. Immediately, I went and registered with the United Nations Development Program. My form was sent to Kinshasa to UNHCR, where it was analyzed and then UNHCR sent representatives to N'djamena to interview a number of asylum seekers. Finally, I got my refugee status on March 25, 1993.

For seven years I lost contact with my family in Sudan. In 1997 I sent a letter to my family, but it took a full year to get there. I didn't find anyone to carry my letter to my family. You see, my village is very remote, and they [the people residing there] don't have mailboxes. So I could only send a letter if someone was traveling near my village and knew one of my relatives. I did not meet anyone who could help me that way until 1997.

The person who took the letter to Zalingei forgot to give the letter to my uncle. He [the person he asked to carry the letter] went to Khartoum, and from there he traveled to Nigeria. He returned to Zalingei, and at that time met one of my uncles and said, "Oh, I met one of your nephews in N'djamena."

My uncle said, "Who?"

The fellow told him, "Ibrahim."

My uncle said, "Oh my, Ibrahim is alive?"

The man said, "Yes, and he sent you a letter."

My uncle said, "Where is the letter?"

The man said, "I left it in Khartoum."

The fellow explained all of this to me when he returned to N'djamena.

For all those years, I became completely isolated from Sudan and the events in Sudan, in Darfur, and from the community, as there are no cell phones, only land lines, in our village, and in Darfur it is very rare for individuals to have phones.

Also, that year, 1997, my father died. When my father died, my uncle wrote me a letter, and that letter took eight months to reach me.

So, over all those years, I was involved in normal life, doing business, conducting trade, farming, traveling between Chad and Nigeria and Chad and Cameroon engaged in trading—transporting hides to Nigeria, where they were treated and sent to Europe to be manufactured into shoes, coats, and purses. I also had a grocery [store] in Cameroon for several years. I also had a restaurant just over the border in Cameroon. I also grew onions in Cameroon.

Then, while I was in Central Africa, where I had transported my onions in order to sell them, I received a message from the Coalition of International Justice [CIJ]. People from Darfur in the Darfur Peace Development Association, based in Virginia, in the U.S., had given my name to CIJ.

Upon my return to N'djamena, I immediately met with Stephanie Frease and Diane Guzman at the Novetel [one of the major hotels in N'djamena] about CIJ's project in Chad and their interest in hiring me as an interpreter [for the U.S. State Department's Atrocities Documentation Project, which was charged with interviewing refugees from Darfur in order to ascertain whether genocide had been perpetrated in Darfur].¹⁴ Two days later, we traveled in trucks to Abeche. I traveled with a man named John Thornton [an attorney hired by CIJ to work on the Atrocities Documentation Project]. When we arrived in Abeche, we set up headquarters. Initially, we rented a house but got kicked out because the African Union had rented it, so we moved to AfriCare. We then traveled to refugee camps, to Guereda and then Farchana, and from there to Hajar Hadide [the Bredjing refugee camp] and then on to Treguine.

On the way to Bredjing, we met various NGOs (Secadav and the Chadian Red Cross Committee) who had been attacked by some refugees. There was a riot. Some windows had been broken out of their car, and some persons were injured. We were warned by Secadav not to enter the camps. I was traveling with Michael Orona and Jonathan Howard, both with the U.S. State Department. I tried to convince them to let me go in alone at first in order to speak to the *umdas* in order to see what the problem was since I was not a Chadian but a Darfurian. But Michael Orona said, "We must check with our administrator," and he called Stephanie Frease and she said, "No, don't enter!" So we returned to Abeche and stayed in Abeche for three days and did not go to any of the camps. During those three days, we, all of the interpreters with the CIJ project, worked with Helga Ninska [a specialist, from Sweden] on interpreting skills.

I was assigned to the investigative team working in Goz Amer. I flew down to Goz Beida and then on to Goz Amer, where I served as Larissa Wakim's [one of CIJ's twenty-four investigators] interpreter. The very day we arrived, we began interviewing refugees who had fled from the atrocities in Darfur.

This was my first time to be involved in the Darfur conflict. Before this activity, I served as an interpreter for refugees from all over Sudan, including southern Sudan, the Nuba Mountains, Darfur, and Al Jazeera (a province in Sudan, which is called Al Jazeera because it is located between the White Nile and the Blue Nile, like an island). It [all of the latter efforts/work] dealt with those who had been tortured in prison, had asylum issues, had fled from the Sudanese army, and had fled from Sudan for political reasons. But interpreting in Goz Amer for CIJ was very different,

¹⁴ For a detailed description and discussion of the Atrocities Documentation Project, see Samuel Totten and Eric Markusen (Ed.) *Genocide in Darfur: Investigating Atrocities in the Sudan*. New York: Routledge, 2006.

very shocking. The stories we heard were very shocking, almost unbelievable. Believable but almost. . . . Definitely hard to hear. They would have seemed unbelievable, but as we went from one interview to another we heard similar stories, similar patterns.

One of the most shocking stories was one told to us by a woman who said that when the village was attacked she ran toward the garden, which was along the bank of the *wadi*. When she was running she reached the sand in the *wadi*, the water was not much, and the *Janjaweed* caught her there and they grabbed her baby from her back. When they grabbed the baby, they stripped off its clothes and discovered that the baby was a boy. They took the baby by the legs and smashed the baby's head against a mango tree. And then they raped the woman. There were many men. She didn't know the number. After seven she lost count. They left her there, and she remained there for two days. When people came to bury the dead, they found her barely conscious, and they took her to Mukjar. She remained there for eleven to thirteen days. When she got out of the hospital, she left Mukjar and went to Garsila, but she didn't know what to do or where to go because her husband, along with her two brothers, had also been killed in the attack. She had no other children, other than the baby that was killed. In Garsila she met a woman from her village, and from there they went to Forbranga and then crossed the border into Chad.

I nearly cried listening to and interpreting the woman's story. For me, it was so painful. This was the first time I learned about such horrors—that all males were killed, no matter whether they were old or babies.

This same woman told us how the *Janjaweed* put old men in huts, locked the huts, and then put fire to the huts. She didn't see this with her own eyes, but was later told about it by her fellow villagers. So, this was the first time I heard about such atrocities, how people were burned alive.

One man we met had three wives, and all were with him in the camp at Goz Amer. While in Sudan, he was arrested for being suspected of being a supporter of the SLA and was jailed in Garsila. While in jail, he was tortured in several different ways. In one case, the jailers stripped the man of all his clothes, hung a jerry can from the roof and put [started] a fire in the can, and as the plastic melted, drops of the burning plastic splashed on him.

They also clamped pincers [pliers] on his testicles and ripped them off. As a result, he lost his testicles and told us he could no longer "be" with his wives because he was like a eunuch.

There was another man who was arrested in Mukjar, and they put a hot iron on his head and on his back. We didn't interview him because he was not selected in our use of a random sampling process. But later he came up to me and said he wanted to be interviewed because he had been tortured. He showed me his head, which he had covered with a turban; where they burned him looked like it was burned down to the bone. It was pure white. And not all of the wounds were yet recovered; they were fresh.

The wound on his back was even more shocking. The burns were large and still raw and bloody with pus.

In Farchana [a refugee camp in Chad, east of Abeche], we were interviewing a woman from Darfur, and the little boy in the next tent came to see the white woman [the CIJ investigator, Karen Goloch], and I noticed the boy's arm, which was held tightly to his rib cage and sticking up in the air. He couldn't move it at all. His little finger was completely destroyed, and his two middle fingers were melded together. His skin was melted and stiff, and he could not move it. When we completed the interview, I asked the interviewee what had happened to the little boy, and she told me that after the *Janjaweed* had killed his father and mother, they had thrown the little boy into a burning hut. After they shot his father, his [the boy's] mother attacked the *Janjaweed*, and they shot her in the head. Then the *Janjaweed* threw the little boy, who was six years [old] at the time, in the burning hut. His grandmother, whom he was now living with in the refugee camp, saved him by pulling him out of the hut.

The grandmother brought the boy and his two sisters to Chad on a donkey. After they reached Chad, the baby girl, who was two years, died from starvation, dehydration, and excessive diarrhea.

Later, while working with Aegis Trust, in 2006, I served as an interpreter for a woman named Anna, who was conducting research into rape victims in Darfur, the relationship between the refugees and the local people in the area, and issues related to violence in the camps and outside the camps. During our work, we visited several camps [Gaga, Farchana, Bredjing, Treguine, Goz Beida, Goz Amer, Bahai, Greda], and while in Farchana I made a point of introducing her to the boy who had been burned, his grandmother, and the boy's sister. I told Anna, "I really want to help this boy. Could you find someone who could help reconstruct his arm?"

Anna said she would try to help. At first, Aegis Trust said it would find the help, but that never came to be. Anna, who is Canadian, approached several NGOs in Canada, and finally Waging Peace came through. By the time we sent the boy and grandmother to South Africa for the surgery, Anna was working for Waging Peace. After the surgery—actually, it took three surgeries—the boy had total movement of his arm and total movement of his hand, with the exception of his little finger that had to be cut off.

Another story I remember was one I didn't hear myself but heard from another interpreter, Jaffar [who served with the Atrocities Documentation Project], and an investigator named Jan Pfundheller. I was told they were interviewing a woman who told them that the black African men in the villages in her area who were captured had been castrated. They had their testicles cut off and they bled to death. The women, the black African

women, collected the bodies and buried them. In our culture in Darfur, it is very unusual for women to bury the dead. They are not supposed to even go near the dead. The exception might be if a baby dies, but it is against our customs, otherwise. But these women had no choice because there were so few men left. The few male survivors feared returning to the villages to bury the dead because they could have been captured, tortured, and had their testicles cut off.

Following the end of the CIJ project, I called Stephanie Frease twice to see what became of the data. I later saw Colin Powell on TV saying, "My government has decided that the atrocities in Darfur constituted genocide." Then the UN decided to send the Commission of Inquiry into Darfur.

In 2005, April, I took *Swiss News* journalists and a journalist with *Der Spiegel* into Darfur. We all traveled to North Darfur and West Darfur. We were there for almost two months. Just as we were getting started, on 7 April, a town, Khor Abeche, was burned to the ground by Arabs from Nitaissa. First we went to Bahai, then to Fourawia, which is in North Darfur. There we met a SLA [Sudanese Liberation Army] commander who was waiting for us to take us further inside Darfur. We drove 700 kilometers to reach Khor Abeche. On the way we visited Sani Haya, where we found mass graves. When we reached Sani Haya it was market day, but I noticed there were not many people there. I asked some people in the *suq*, "Where are all the people?" and they said, "You haven't heard? There were massacres here." I informed the journalists about this, and the local people took us out to the massacre site.

There were numerous graves, and in each grave there were numerous people buried—in some eleven, in others thirteen, and so forth. Altogether, the people said about eighty-seven had been murdered during the massacres. The men had taken all the women and children out of the area fifteen days before the attack. They did this because the Arabs [who resided in the area] had all left. The survivors said the government had transported the Arabs out of the area. The government took them to Mileet and to El Fasher. That was a sign that an attack was coming.

The massacre site was just 100 meters outside the village. The attack was carried out by the GoS and the *Janjaweed*. They dragged people out to the bush where there were many trees, and they hanged the victims.

One man who was hanged lived because they placed the rope more on his chin than around his neck. The killers did this by accident, and that man survived. We met that man's brother and interviewed him. When the man we interviewed saw that we were going out to the mass graves, he followed and told us that story. He told us that his brother, the survivor, had left that area and moved toward Khartoum and was not in Darfur at that time.

From Sani Haya we continued on our way to Sayah, where Minni Minawi¹⁵ was visiting, and we interviewed him. We heard that Jayah was partially burned down, so we went there to inspect it.

At the time there were rumors that the SLA was going to split, and the journalists asked Minni if that was true; and if it was true, was he a hero [leader] of one faction. He denied that there was going to be a split, but at that time he was actually laying the groundwork for the split.

We traveled with Minni and his soldiers. There were about twenty-five pickup trucks and lots of heavy weapons and two trucks that can travel easily in the desert that carried soldiers and even another truck that had broken down. We went to Kattal, a town that was held by the SLA at the time. The town was named for the Kattal tree from the Birgid language. Birgid is an African tribe living in that area. In Arabic, Kattal means "killer." The town was named Kattal to send a message that this land belonged to the Arabs.

At that point, Minni left, and we went on to Khor Abeche. It was a town of mixed African tribes: Fur, Dago, Borgo, Birgid, Zaghawa, and Mimi. It took us almost eleven days to reach there. The attacks in Khor Abeche were carried out by the GoS and *Janjaweed*, and there were air attacks, too. The survivors told us that the number of people killed there were almost 200 men, women, and children.

There, we interviewed about eighteen men and women survivors. We were told that when the soldiers readied to attack they gathered the only Arabs living in the town and took them to the mosque, and after the attack the soldiers burned the whole town down. They [the soldiers] then took the Arabs to Nyala.

There [in Khor Abeche], we discovered the AU [African Union] were building a base on the ashes of the village. We tried to talk to the AU soldiers, but they would not talk. See, when the village was attacked, the AU did not come to halt the attack, but after the village was destroyed, the AU showed up. But they said if we wanted to talk to them, then we needed to speak with their commander, who was in Nyala, but, of course, we could not go to Nyala to seek such permission [as it was too far away and not practical to travel that far].

In Khor Abeche, the medical clinic had been destroyed. We saw evidence of the destruction, medicines displaced all over the ground.

¹⁵ Minni Minawi is a major leader of the Sudanese Liberation Army (SLA). Under Minnawi's leadership, one faction of the SLA signed a peace agreement, the Darfur Peace Agreement, with the al-Bashir regime in May 2006. Fighting continued unabated, with Minnawi's faction battling other SLA factions. In 2006, Minnawi was appointed chairman of the Transitional Darfur Regional Authority, the major Sudanese official in Darfur. He, however, was slowly but surely shorn of his power by Khartoum.

Next we went to Abou Hamrah and Hamada. In Abou Hamrah we saw the partial destruction of the village and the graves of the victims. The attack was carried out in the morning, while school was in session. Seventy-four primary students were killed. Thirty adults were also killed. This is the number 104, all of whose bodies were burned in the village. Others had been killed outside of the village. The attack was carried out by the *Janjaweed*, who were from Netaiga. The GoS troops were from Nyala.

We saw the mass grave where the people were buried in Hamada. We were told that no survivors existed there, that all of the survivors were in IDP camps.

Two days later we arrived in Jawa, where there was an SLA prison. Among the war captives there were government soldiers (about fifty) and *Janjaweed* (up to twenty). Some of those *Janjaweed* were from Chad, Chadians.

When we asked to speak to a *Janjaweed*, they brought us a *Janjaweed* from Chad. When he arrived, we asked, "Where are you from?" and he said, "Chad, near Abeche. Beteiha."

One of the journalists asked me to ask him why he had been fighting.

"First," he [the prisoner] said, "for the money."

As soon as I began translating, he interrupted me and said, "No, no, on the behalf of the government [Khartoum]."

Then the journalist asked me to ask him, "Why are you fighting in Sudan when your government is in N'djamena [Chad]?"

The *Janjaweed* turned his back on us, and then said, "For the Arab Gathering."

The commander of the SLA prison had turned over 200 prisoners to the International Red Cross, and the GoS was supposed to turn over its prisoners at the same time, but it never did. So the commander said he was holding on to the current prisoners until the GoS came through on its agreement, promise.

I could tell you many more stories. There are so many, but we don't have time. They won't be lost, though, because I plan to write a book about my life and my experiences.

Juma Adam Juma, a member of the Fur tribe, was born in 1952 (not sure of the month or day) in Tou. He has twenty years of schooling, all in a "Traditional School" for Koranic Study—no public schooling. He is an imam. He is married with eleven children. He currently resides in an IDP camp in Mornei, West Darfur. He has resided there for the past six years.

The interview was conducted by Samuel Totten on December 18 and December 20, 2009. Hussein Idriss served as the translator. It was conducted in a room at the Chez Wu Hotel in N'djamena, Chad.

I have one question, first, for you. Do you work for the Sudanese government? [Response by Totten: "First, no, I do not work for the Sudanese

government. Second, I am not affiliated with the GoS in anyway. Third, in July and August 2004, I served with the U.S. State Department's Atrocities Documentation Project, whose express purpose was to collect data through interviews with refugees from Darfur to ascertain whether genocide had been perpetrated by the Sudanese Government or not against the people of Darfur. Fourth, I have edited a book entitled *Genocide in Darfur: Investigating Atrocities in the Sudan*. Fifth. . . ." At this point, the interviewee said, "You need not provide any more information. I am ready for the interview."

The nomads, Arab nomads, began bothering us in 1970. At the end of the rainy season, before harvest, the Arabs brought their animals—cows and camels—and let them graze on our farms, and [in the process] they destroyed them.

That continued throughout the 1970s and 1980s. In the 1980s, they started to bother us along the roads outside the village and in our *suq*. They'd steal people's goods and animals and even kill people. This happened weekly.

My family and I were personally attacked. One of my brothers, Idriss Abdelkarim, went to the *suq* and was killed by an Arab. This was in 1984. He was born in 1951 and killed in 1984. He was a trader.

They stole a good donkey (a *rufawi*) from my brother. One man [with his brother] also had a horse stolen. *All* of their goods were stolen. The others had animals too, but when the shooting started, many [of the animals] scattered and returned to the village.

When my brother was killed, he was not alone. There were three with him, and all were killed. One was the son of my father's brother. This was at the end of [President] Nimeri's time.

I was not with them, but when we heard they were attacked—one who was with them fled and told us—we rushed to them and found the dead bodies. When we collected the bodies, we saw the covers [jackets of the bullets] and recognized them. They killed them with Kalashes [Kalashnikovs]. We found many covers, not one or two.

When we arrived, the police were there. We all followed the tracks of the attackers to an Arab hamlet, and the attackers were arrested and taken to the police station and remained in jail for two days, and then were released. I don't know if they paid to get out or what, but when we spoke to the head of the police, an Arab, he said, "Since we did not capture them at the place of the incident [crime], we cannot hold them."

We were going to go and attack the killers ourselves, but the police said, "No. It's over. We arrested them and have released them, so you cannot attack them." The Arabs immediately left the area.

My brother had a wife and four children. The oldest was seven years [old], the youngest about one year. The child was still drinking just milk [suckling].

In 1988, Arab nomads attacked our village. [At] five o'clock in the morning the attack began. I was returning home from the mosque and I heard

the shooting. It was a big village, and the shooting was in another part of the village. This was in Tou. The president of Sudan at this time was al-Sadiq Al-Mahdi i.

We called all of the villagers to come, and told them we had to fight back. We fought them with weapons [meaning, rifles]. By this time, we had begun to purchase weapons. The government was providing every state with sugar. Each state has a division, and that division is given the sugar to pass out to each village, and each village gives the sugar to each individual. We took the sugar and sold it and purchased three Kalashes.

There were many, many attackers, between fifty and sixty. They came on camels and horses, and all of them had weapons—Kalashes, GEMs, and Haun (machine guns). And one called Fang. We only had the three Kalashes and traditional weapons, spears. We resisted them from five o'clock in the morning until five o'clock in the evening.

As soon as our village was attacked, one of our fellow villagers rushed to the police station and reported the attack, but the police said they had no fuel and could do nothing. They had fuel, but they did not want to go. There were black men [police officers] there, but unless they are given orders by their superintendent, who is an Arab, they cannot act.

Only God helped us [in the battle]. Four people from our village and two people from another village who came to help us were killed. Twenty were injured. The attackers did not burn our village, and only burned down two huts.

Our village was attacked about one year later, in April 1989 in Omar al-Bashir's time. This time they stole many animals from us. About 750 cows, eight camels, also horses and donkeys, but I don't remember the number.

The attack came at six o'clock in the morning. This time I was at home, with my wife and some of our children. Some of the other children had gone that morning to the *wadi* to work in our garden.

This time the Arabs came with another strategy. This time they came at six o'clock in the morning, which is when the animals are taken out to the pasture. They waited to attack until the animals were out, and then they surrounded the village so no one could get out, and then they stole all of our animals. This time we did not resist. We couldn't. The government had already come and confiscated our Kalashes. Two of my family members were shot and injured. My wife's father, Ismail, was shot at by a Fang. The shell grazed his shoulder, and his face was burned. He was blinded in his right eye. His horse was killed. The other [person who] was [shot was] my father's brother's son, Abdullah Haroun. He was shot in the right hand, and to this day his hand still does not work.

We never got our cows or camels back. We know what direction they were taken—toward Zalingei—but we don't know who took them.

Just after this attack, the government came to our village and insisted on searching every home for weapons. We had no weapons. They threw

our belongings on the ground, turned jars upside down, and even some people were beaten. No consideration at all. They may have suspected that we sold the sugar to purchase the weapons, because from that day [forward] sugar was denied us.

In 1990, the Arabs attacked our *suq* and stole twelve camels. They intimidated people by shooting in the air. They killed one man. His horse was shot and he was, too. The horse ran back to the village, and when the horse reached the village the horse died, and we discovered the man was dead, too. Another man, a villager, was beaten on the head, and to this day he can't see. One eye can see very little, and the other eye is blind. The killers and shooters were not arrested, and we never saw our camels again. We complained to the police, but they did nothing.

Throughout the 1990s there were weekly attacks on different villages. People were killed weekly, injured weekly, and animals were stolen weekly. All these attacks were carried out by nomads, Arabs. Our village was not attacked until 1998. However, our people were attacked out on the paths in the areas where they traveled.

[Note: We took a ten-minute break so that the imam could pray. He walked to the mosque at the Novotel across the street from the Chez Wu Hotel, where the interview was taking place.]

In 1998, February, I was with my younger brother and we were traveling from the *suq* back to our village. My brother was on my camel. There was another man riding a camel near my brother's, and he was pulling two camels along behind him. I was riding behind them on a donkey. There was also a woman riding a donkey. We were riding along between two canyon walls in the *wadi* when we were attacked.

Four Arabs attacked us, two on horses and two on foot. My brother, Abdalla Khamis Abaker, was shot and killed. He died right there. They took his camel and 200,000 Sudanese pounds from him. The other man resisted, and they killed his camel and stole the other two he had. They also took the donkey of the woman. When they started shooting, I halted my donkey, and since I was far behind the others, they [attackers] did not see me, and [thus,] I was left untouched. But it was the same as if I had been attacked. They killed my brother, stole my camel, which my brother was riding, and took my money, which my brother was carrying. The Arabs knew I was a trader, and thus they were expecting us.

We made a carrier [stretcher] out of branches and cane and carried my brother to our village. The next day we buried him. He had just gotten married.

The day we carried my brother's body to the village, we reported the attack to the police. The next day, when we were burying my brother, the police arrived at our village. One policeman was black and from the Fur tribe. The other five police were mixed, black and Arab. The policeman who was Fur said, "We know the attackers' place, and we should not let them get away."

They [the police] distributed some weapons to us. Some were GEM and some were Kalashnikovs. About twenty-five villagers joined the police in order to attack the Arabs' hamlet. I, too, went. When we arrived at the hamlet, we surrounded the hamlet and the police told the Arab leader, "You should turn over the attackers." But the Arabs refused, and since they were ready for us, they had already taken [offensive] positions. Then they began shooting at us. As we fought, we killed two Arabs. The old Arab leader we had been negotiating with raised up a white flag, and the police saw it and said we should all stop shooting. The Arab leader explained that they were willing to turn over the criminals, the attackers. The old Arab then brought out two guys, but the police said, "No, there were four." The old Arab said, "Yes, but they didn't arrive here. We will search for them and bring them in." The police told us they would take the two prisoners to Zalingei, to prison. They also told us that they would inform us when the two men would be tried in the court. When the time came, the court called us to attend the judgment. When we arrived with all of our family members at the court, the judge asked me, "Who saw these detainees attack Abdalla Khamis Abaker?" The woman who was with us when my brother was killed said, "Because the attackers covered themselves [their heads and faces] with turbans, I cannot recognize them."

The next thing the judge said was, "These people are free to go."

I was furious, and I told the judge, "This is not justice!"

The judge, an Arab, said, "Black people have no rights to justice."

My brother looked at me and said, "Forget about the judge. We will find our rights at Doomsday." So we just returned to our village.

Attacks by Arabs, nomads, continued from 1999 through 2003. They continued on a weekly basis, but our village was not attacked.

During the harvest of 2003, Arabs, about 500, on horses and camels, attacked all the villages in our area: Tour, Bogoj, Bala, Barako, Toulus, Ourom, Dirasa, Lang, Furi, Juro, Fojo. They didn't burn the villages down, but chased all the villagers into the mountains: Faru, Fata, Kiriri, Souniga, and Samara. All the villagers remained in the mountains for about one month.

The attackers came about twelve o'clock in the daylight [afternoon]. When they attacked, the Arabs screamed, "Omar al-Bashir said to hand over this land with trees, otherwise you will die!"

They chased after us on horses and screamed, "Even if you run away, we can kill you." They were shooting as they raced in and out of the crowd of people, shooting GEM, Fangs, RPGs, and Kalashes. They are also screaming [*krourouking*, an eerie and frightening high-pitched sound]. This day they were not coming to kill us, but to intimidate us.

While we were in the mountains, some people went down to our village one week after we had fled, and saw that the Arabs had withdrawn. Darfur rebels, though, had settled in our village. When the rebels [originally] arrived, they had chased the Arabs away. The rebels sent word for

us to wait to return because they sensed the Arabs may return to attack the village.

When we returned to our villages, the Arabs attacked again. This was in December 2003. The end of December. This time they attacked from all four directions.

At first the attackers arrived in vehicles, milky [colored], called Thatchers [nicknamed, according to the interviewee, "law enforcers," after, or in honor of, former British Prime Minister Margaret Thatcher] and *doshkas*. Some came in the evening and some in the morning. They settled outside the area of the entire village. There were many of them. I believe the number was around 10,000. Early in the morning, they began burning a lot of the villages.

The rebels were with us and told us that it was better to flee because they could not fight such a great number. So that evening, when the attackers arrived, many of the villagers fled and continued to do so through the night until the morning.

My brother and I, along with others, left with our cows and drove them to the mountains. For three days the cows were without water. We decided that we must take the cows down to the water point, and when we did the Arabs attacked us and stole all of the cows.

When we were in the mountains, we could see all the villages. We could see the vehicles, the camels, the horses, and the way the attackers moved around. We could see everything. They put fire to all the villages at one time. There was very big fire. In many villages there were sheds made of brick where sacks of cereal were kept, and for over a month those fires did not end. In the village the fires was red and angry, then with smoke, black.

In the morning, the planes, Antonovs, came, and they came and came for many days. They were white with a red sign, like a flag, near its tail. We could not see what the sign, the flag, was because they [the planes] were so high.

Those planes bombed the village. They dropped many bombs and then left. When they returned, they bombed again. They bombed the same village many times. The bombs destroyed more than anything else [more than any other weapon], both people and the people's property. Many, many people were killed. In one place the Antonovs attacked a village called Smara and killed twelve people with one bomb. This time they were out to kill people. Whenever they caught a man, they killed him. When they saw you, you were dead.

Actually, I cannot tell you how many people were killed, but I can tell you that in one village, Oroum, fifty people were killed. Altogether we are talking about eight villages.

The women, they [the attackers] beat, and took what was valuable from them. If the girl was young and was caught, they raped her. The attackers were all mixed (Arabs with GoS soldiers) and dressed differently. The soldiers were wearing camouflage uniforms.

After we returned, we discovered the attackers chopped all of the trees down: papaya, mango, guava, banana, sugar cane, and citrus—lemon and grapefruit—in our orchards. Everyone's trees! More than a thousand trees. More than thousands. My father, alone, had 150 trees. The sugar cane, they let their cows eat it. And they destroyed all the cane, ate it all.

At the outset of the attack, some villagers went directly to Mornei, four hours by foot. Some, as I said, went directly to the mountains.

The attackers figured out that many were fleeing to Mornei, so they drove toward Mornei, and halfway between our village and Mornei they (the GoS troops and *Janjaweed*) dug a huge hole (about thirty feet by fifteen feet). It was so big it could not be dug with spades. This was by a *wadi*, Wadi Medere. So, as the people fled toward Mornei they would be shot and killed and thrown in the hole. For one month, the GoS soldiers and *Janjaweed* remained by that hole. Whenever any African man approached, they killed him. Even little boys as young as five years [were shot and killed and thrown into the huge hole].

The women, they didn't kill, but they beat them and took what they have. [Note: At this point, Totten asked the interpreter what exactly the imam meant by "took what they have." Totten said, "Could you please ask the imam, with sensitivity, whether he is talking about their produce and other material wealth or something personal?"] Yes! They beat the women and raped the young women. Many women, young women—fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, or twenty—were raped, for sure. They raped others, much older, but any women twenty or under were surely raped.

Those people [who were killed and tossed] in that hole were maybe up to 250, 300. But the number is probably more than 300.

Later, the attackers covered the bones with dirt. I went there, and I saw the dirt raised up [in mounds] where those people were murdered. Everyone in that area today calls that place a place of massacre.

When we came down from the mountain, we, too, headed towards Mornei. But along the way we saw some people from our area heading toward us, and they told us about the big hole and that people were being killed and that we should not go that way. So, we then returned to the mountain, where we remained for three days.

Three days later, we decided to flee the mountain again. Mornei was the closest town, so we felt we had to go there, but this time we decided to go the long [roundabout] way in order to go by [bypass] them [the attackers]. But the attackers saw us, and when they did, three of us hid under some bushes, and I and two others climbed up different mango trees. The trees were bushy with leaves, and this was at night. The attackers didn't want to enter the bushes, so they put fire to the bushes. Two of the men in the bushes attempted to flee the fire, but the attackers shot at them with GEMs and killed them. The third one was thrown in the fire and was burned alive.

They searched for us in the trees, but they could not locate us. They said, "Maybe those others fled." And they rushed off.

We remained in the trees for about another hour and then headed, again, in the direction of Mornei. Just before we reached Mornei, we came across a group of Arabs who were sleeping, but one of the Arabs' horses whinnied, and two of the Arabs woke up. Two of us hid under some small trees, but the third person with us began running. One Arab screamed to the others, "There are *abids* [slaves] here!" The one who yelled that began chasing our friend. He shot at our colleague, and our colleague was killed immediately. We waited for some time before we tried to make our way past them in order to get to Mornei.

There [in Mornei] we found a white man named John. He was helping to organize people and give them food and shelter. In that area there was already an IDP [internally displaced persons'] camp, so John received us and gave us food and a tent. We were given a specific place to erect our tent. Only later were we registered in the IDP camp.

Even in the IDP camp, it was not secure. Arabs would enter the camp and enter people's tents, and when they were caught they claimed they were searching for weapons, but really, they stole anything they found. They also attacked and injured people.

Very near the IDP camp there was a *Janjaweed* camp so [black African] men could never leave the camp. If they did, they risked being killed. Their camp was not even one kilo away. For eight months, *no man* left this IDP camp.

Also, at this time there were no toilets in the IDP camp. There were thousands of IDPs in the camp. The lack of toilets and a place to relieve ourselves caused much grief. It bred disease, and the stink was horrible. In one day, I believe, over fifty people died as a result of this unsanitary situation. The problem was not solved for six months. Finally, white people put in the toilets [holes in the ground], but then 100 people had to use a single toilet.

Later, the white people paid us to dig holes for use as toilets for our own families. Many people did this [took up the offer].

White people brought in water to us. They brought it in a very big tank on a truck and distributed it.

After we came down from the mountain the last time, my father, my mother, my brothers, and my son were all killed. I went to Mornei with the five I told you about while my father attended to my immediate family and our larger family, and on the way all those I just mentioned were killed.

I ask myself, "Why am I here?"

Immediately after I arrived in the camp, I asked some fellow villagers, men, "Where is my family?" They told me, "They have not arrived." They did not tell me they were killed. I then went and asked the women if they knew. All of the women began screaming, and then one woman, my sister, told me who had been killed. She was with them when they were all killed. I am up to today so sorrowful about their deaths, my losses.

Later, I heard that some women, before they reached Mornei, returned to the village to search for food and to see if any of their possessions were

still there, and they discovered that three elderly women had been burned alive in their huts. One of those burned alive was my father's sister.

From 2003 to now, I have been in Mornei.

Miram Adam Muhammed (the name used here is a pseudonym created by the interviewee) was born in 1974 in Turbo, South Darfur. She is a member of the Fur tribe. She completed thirteen years of schooling, including Teacher Training in Mathematics, in order to qualify to teach at the intermediate level. She is married. She has no children.

The interview was conducted by Samuel Totten on December 19, 2009. Hussein Idriss served as the translator. It was conducted in a room at the Hotel Chez Wu in N'djamena, Chad. The interviewee is a younger, beautiful woman with high cheekbones, lively brown eyes, small nose and ebony skin. She is dressed in a gorgeous light purple tob (worn like a sari) that covers her head but not her face. As for her pseudonym, she said, "I still reside in Sudan, and I can't use my name or I will be in trouble." She currently resides in an IDP camp called Abu Shouk, where she works as a teacher. Her husband, who is a rebel leader, had to flee Sudan and is currently residing in N'djamena. She was visiting her husband during a school break.

In 1989, the Arab nomads used to come from the south to the north, and when they did they allowed their animals to graze on our farms. They would eat all the crops and destroy them. The Arabs also took [used] our water points [wells]. [When they were there,] they would not allow anyone else to use them. They were water points we dug. They, the nomads, had arms, GEM and Kalashes [Kalashnikovs], and if anyone tried to resist their taking our water points, they would threaten them. They shot men and attacked the women. If the women came to the water points for water, they would hit them with whips. Outside the farm, they often raped the women. This was done systematically from 1989 through 2000.

In 1999, in September and October, the Arabs came and surrounded the area, and for fifty days no one could leave their village or go out to their farms. More than fifteen children died in our village. There was no food to eat, and they starved to death and became sick and died, too. Most were babies and little children, those under five years [old]. We would not go out for any reason. There were thousands of Arabs, only men, no women were with them this time, and they had weapons, so no one could go out. As they stayed, their animals destroyed the farms. After fifty days, they had totally cleared the land of all plants [produce], so there was nothing for their animals to eat. This time [meaning this particular time when the Arabs showed up] was hardest because the Arabs surrounded the whole area, preventing us from even leaving our villages.

Because of this [incident], the villages decided to defend themselves because this was no way to live. So people began to trade [for] and purchase weapons. Primarily Kalashes. The weapons were kept in one office, and when the time came to use them, the weapons were distributed to the men.

Three of the children who died were in our family. Two of my sisters each had a child die (one was two years and one was three years), and one of my brother's children died (ten months). Also, some of my cousins' babies died.

There was no food at all in the region because we couldn't reach our farms. So they tried to starve us to death. Because of the starvation, the children became ill. They suffered greatly. All the time they cried and cried and cried.

This happened in all the families. You could go to any family and see such suffering. This pain was everywhere.

We had no weapons at that time, so we could not help ourselves. We could do nothing.

Five people were also killed by the Arabs. Some young men tried to go to the garden to get some vegetables and fruits, and they were shot dead.

In 2000, our villages got some—little, little, little—relief. That was because after we got the weapons, the next time the Arabs attacked, our men shot the weapons in the air and frightened off the Arabs. From that point, they [the nomads] knew we had weapons and that we might protect ourselves.

In 2001, there were no problems. But in 2002, the problems returned. In September 2002 Arabs attacked our villages [and] stole camels and cows. Over twenty cows. Our men chased the Arabs, and fought them, and killed several of them, and brought our animals back to the village.

The Arabs reported our people to the police, telling them, "These people have weapons and are going to be rebellious." The police, the head of police was Arab, so he supported the Arabs' complaint. Immediately, as soon as they received the complaint, sixteen vehicles carrying police arrived at our village, and they searched all our houses but didn't find anything. The people [had] hid[den] the weapons in the office so the police could not locate them.

In 2002, I was studying in Nyala, and I heard about *The Black Book*.¹⁶ People told us [she and her fellow students] about *The Black Book*. I was very interested in reading it, but I was told, "If you wish to be arrested, then ask around for a copy." We were told that many people were arrested who tried to read that book so we feared trying to locate it.

I heard that in the book it said how people in Khartoum wanted to wipe out black people. This book brought out a lot of secrets that people didn't know.

¹⁶ *The Black Book: Imbalance of Power and Wealth in the Sudan*, commonly referred as *The Black Book*, was written and distributed in May 2000 by the Justice and Equality Movement (JEM). In it the authors assert that the al-Bashir regime (Khartoum) is inherently unfair in its treatment of the people of Darfur (and, in fact, all of the people of the peripheries, or outside the riverine area of Khartoum), and details the disenfranchisement of the black Africans of Darfur. It calls on the government to respond to the critique and provide more opportunities for the black Africans of Darfur to have representation in the Sudanese Parliament and to provide more roads, bridges, schools, hospitals, etc. in Darfur. Initially, *The Black Book* was published anonymously. When the requests went unheeded, the rebel groups began their attack on government installations in the Darfur region.

In 2003 is when the real problems started. In the past, whenever the Arabs arrived in our region, came to our villages, the Arabs came with their animals, but at this time the government gave them weapons and they [the Arabs] came without animals. This time they traveled on [rode] horses and camels. They [the Arabs] also rode on vehicles, Land Cruisers, with the *Jesh* [the GoS soldiers]. These Arabs, the *Janjaweed*, would attack people, black Africans, traveling between their villages and the *suq*. And they would also attack villages. They only attacked Fur and other black African tribes, never Arabs.

In 2003, August, our village was attacked. Early in the morning the attack came, before the sun came up. I was sleeping, and woke up to the sound of weapons. The weapons woke me up. We, my family, all lay down in the house.

The attackers came all together, GoS troops and *Janjaweed*, in vehicles and on horses and camels. Our people fought back, but after some time we fled.

The attackers broke into our houses, including our home, and beat us, yelling, "You have rebels here!" When they broke in, my father and mother and two brothers and I were in the house. All the children had run out in fear before the attackers broke in the house. When the shooting began, there was chaos and all the children in the village were frightened and began running and screaming. You see, the little children lived [slept] in their own hut, our parents lived in their own hut, and we, my younger sister and I, lived [slept] in our own hut. So, as soon as the shooting began, the children, terrified, began running. It was a full day before we found them.

When the *Janjaweed* broke in our home, they screamed, "*Abid* [slave], Fur never ruled Sudan and now you want to rule?" [Comment of the interpreter: "The attackers were suggesting that the black Africans had plans to carry out a rebellion in order to take over Khartoum.]"

Many *Janjaweed* entered our parents' hut, and some immediately began beating my brothers with whips and some also, right away, tied up my father. They tied rope around his ankles and around his wrists. At one moment there were five *Janjaweed*, all wearing camouflage but with no patches [insignias] on their uniforms, in the hut, with their weapons, Kalashes, aimed at us. After tying my father up, they beat him and whipped him with short whips used on horses and donkeys, and beat him with batons and kicked him. My father and brothers couldn't resist at all. How could they? The *Janjaweed* were heavily armed.

The entire time my mother and I begged the attackers not to kill my father and brothers. We also begged my brothers not to resist. Some among the attackers had kind hearts and didn't want to hurt people, and they talked amongst themselves [with their more brutal comrades], and so some listened to us and some didn't.

They didn't burn any part of the village before leaving and attacking another village. After the initial attack, all of us, all the villagers, fled from the village. We did so because even though the attackers left, there were other *Janjaweed* on the horizon with their women, and we believed they

were heading to the village to loot all of our possessions. So we all fled to the *wadi* and the forest in order to protect ourselves. The *wadi* was about three kilometers from our village.

We, my family, ran to the *wadi*, and in the *wadi* there is a cave that was created by the *wadi*'s water, and we hid in the cave. It's a big cave, and there were other families in the cave with us. After we reached the cave, my brothers went to search for the children. When they located one, they would bring the child to the cave. We remained in that cave for fourteen days. Some villagers brought flour they milled from their the grain to the cave, and they shared that with the other families. We made porridge.

The attackers stole all of our animals: cows, camels, horses and sheep. Thousands. Altogether, we, all the villagers, had thousands of animals.

When we returned to our village, we found that they [the attackers] had stolen many things, destroyed others, and left other things intact. They mainly stole our gold, our money, and large cooking items such as jars [and] trays, but left behind cups and plates.

In this attack no people were killed, but more than 100 people were injured. Some were due to beatings, and some due to being shot. Some died of their injuries.

During the attack on our village, another village, Belli Seref, was attacked. Over fifty people were killed there. Men and women and children were killed. They tried to put fire to the village, but there was a heavy rain, so fire only destroyed part of it.

I think the reason the other village suffered so many deaths and fire is that when the attackers attacked our village, some people resisted but then withdrew, and we fled. The resisters [from her village] rushed to the other village that was being attacked and helped those villagers fight the attackers. They kept up the resistance for a long time and did not withdraw, and so the attackers used many heavy weapons and fought hard. They may have thought they were fighting rebels.

This was all very strange to us. In the past, the nomadic Arabs always came to our land with their animals and we always had problems with them, but we solved the problems among ourselves. But now, as I said, they came without animals but with weapons and in uniforms, so we truly thought they had come to kill us.

As they, the attackers, were leaving, they said, "We shall not kill you now. We will leave you so you can breed more animals, and we will return for them."

We didn't leave the village because this time they did not destroy our farms, and we had not harvested yet, so we remained. We planned to leave the village after we completed the harvest, but upon completion of the harvest, government officials came to our village and told us we should not leave because it was going to provide security. Our villages were the main source of food (produce and meat) for the largest town (Malam) in the area, and when they discovered that we were planning to leave the area, it presented a

major problem for them. So, they spoke to the authorities and the authorities then promised that we would be protected. We believed them, and we stayed. Many were suspicious, and many who still had money left to live in towns.

In early January, there was relative calm. We had heard about attacks, big attacks, taking place in other parts of Darfur, but, like I said, there was relative calm in our region. But in February and March, the military and the *Janjaweed* began destroying the area. Because their vehicles had their own special roads [versus the usual paths that people traveled down], the Land Cruisers and Renaults (lorries for carrying goods and soldiers), and the horses and camels, could go anywhere on land. They all arrived at the same time. The Land Cruisers, some white, some gray, and the Renaults, green. The attackers came in the thousands. At the very same time, they began destroying the farms and attacking the villagers. They put fire on the farms while others attacked the villages. When attacking the farms, they put fire on our *dirbo* [similar to a silo] where we kept all of the grain after it had been harvested and before it was cleaned. They put fire on this dry grain. The *dirbos* threw up big fire into the sky, sending sparks flying into the air. Even the forest [nearby] caught fire.

As the attackers rushed toward the village, they fired their weapons—rat a tat rat a tat—and all the villagers began screaming, crying, and running. More than seventy-five people in our village were killed. Even the old people, the mad [the mentally disturbed], and the blind! Children, too! Woman and girls! All!

This is not fighting. There was no resistance. These people—the attackers—fear nothing. They do anything they want. Shoot, loot, rape, kill.

While they were attacking, they captured and collected the girls and raped them afterward. When a girl is small and can't move [after being raped and is injured], they take them [the girls] and use them for several days. Many girls in our village suffered in this way.

When they took the girls, they raped them. Young girls. From eighteen years [old] down. Not “just” raped them, but many men raped them, for hours and days, and then they just left them in the dirt, the sand.

Fire was put to the village and huts. This fire . . . all was destroyed, totally.

There were planes, Antonovs and helicopters in the air, but they did not drop anything. For almost two years, Antonovs [periodically] flew above our village and they never dropped anything.

Our family fled, initially, to the cave—the same one we went to during the earlier attack. My father had been beaten severely and was badly injured, so we tended to him the first day and night, and the next day we got a donkey, put him on it, and traveled to another village, Dogo.

When the attackers finished destroying our village, they attacked and destroyed many other villages.

We left the cave at night and headed toward Dogo. On the way to Dogo, there were thousands of people fleeing. We passed our village and stopped

[briefly] there. There was much smoke, and some huts were still with fire [burning, flames aglow in the night]. We saw the same thing in the other villages we passed.

In Dogo, there is a military garrison. Fifteen villages traveled there to be protected. We knew that the commander, Altaib, there was a very good man. Even though he is from an Arab tribe [I don't know which one], before he had chased the *Janjaweed* away from the area and protected us. So we trusted him. We also went to Dogo because there are vehicles there [that they could hire to transport them from the area].

In Dogo we waited seven days for a vehicle to drive us away. Unfortunately, during that time, the rebels, SLA, attacked. I say "unfortunately" because when the rebels attacked the garrison, the government sent planes to attack the rebels, and we knew there would be war and we would not get a vehicle for a long time. They sent Antonovs and *Ababils* (jets). The Antonovs dropped fire [bombs], and the *Ababils* dropped fire, too. The *Ababils* and Antonovs dropped fire from ten o'clock in the morning until four o'clock in the afternoon. There was so much destruction.

When we were in Dogo, we had radios with us, and we turned them to FM, and the pilots also use FM to speak with commanders on the ground. When the rebels attacked the troops in the garrison, the troops ran and dispersed themselves among the villagers because they knew the rebels would not attack them there because they [the rebels] did not want to injure the villagers. Also, the head of the garrison told the pilots not to drop bombs on the villagers. We heard that.

That day, the rebels occupied the garrison, took all the weapons, and then left. After the rebels left, the military troops returned to the garrison. The government also sent in reinforcements. A plane came and dropped off weapons and picked up the injured soldiers.

One hour after the attack stopped, at four o'clock in the afternoon, we left for Tabit. We only had one donkey, which we put my father on since he was injured. It took twenty-four hours by foot. From there we went directly to El Fasher. We left our donkey there [in Tabit], and took vehicles to El Fasher. In El Fasher, all of the refugees gathered there because refugees had arrived there before and had been received by UNICEF. It [UNICEF] also received us, providing us with food, a plot of land, and a tent. They also brought water to us and helped take care of our health. We remained there for two months.

UNICEF then took us to Abou Shouk, an IDP camp. That was in June 2004. We, all my family, remained in Abou Shouk through today. But, as I said, now I work as a mathematics teacher in Dirbat. I moved there and married there. I remained in Dirbat for three years. But the fighting amongst the rebels in the SLA became dangerous, and so I returned to Abou Shouk.

At that time, my husband, Abous Bakar, left Sudan for Chad and now resides in N'djamena. He was a rebel in Darfur. He came here [N'djamena]

by choice. He's still with the SLA and is a rebel leader. I married him solely because he was fighting for our people, and [because] I had nothing to give. He is courageous and a fierce fighter for our people.

Before this man, I was married to another rebel leader, and he was killed. [Interpreter's comment: "Her husband was the commander of the eastern part of Jebel Marra. He was very well known and highly respected."] He was killed five days after our wedding in 2005. My husband's men said, "This woman was our commander's wife, and we must not abandon her." So they told me I could choose any man among them for my new husband. They said who I chose would agree to be my husband, but if I didn't want any of them, that was my choice and that would be fine.

So I decided to give myself to this man [her current husband]. The man I chose was a real fighter for our people, the most courageous [after her first husband]. There was no love between us when I made that decision, but there is now.

Mohammed Gires Badur was born on November 7, 1980, in Abosogo, West Darfur. He is a member of the Massaleit tribe. He has five years of education, and is factotum. The interviewee exuded confidence and presented himself as a no-nonsense person who had seen and experienced a lot in life. He is married, with three children, girls ages four years old, three years old, and five months.

The interview was conducted by Samuel Totten on July 12, 2010. Ramadan Tarjan served as the translator. The interview was conducted outside a tiny refugee camp, Komu, on the outskirts of the village of Kauda in the Nuba Mountains. The interview was conducted in a small, bare classroom of an elementary school adjacent to the refugee camp. Rain poured down on the corrugated roof of the school house and splashed inside the open doorway.

In 2003, 15 of June, at four o'clock A.M., Arabs attacked our village, Abosogo, and killed nearly 40 people, including my grandfather and two of my brothers. I was sleeping, alone, in my *tukul* [a small roundish mud hut with a conical thatched roof]. I woke up to the sound of the gunshots, and when I rushed outside I only saw the flashes of gunfire but I could hear the noise of horses.

The gunfire was very heavy. Nearby was a ditch we used for building bricks and I jumped in it and hid. For the first hour the gunfire was non-stop but the second hour it was single shots as they, the attackers, discovered and shot individuals.

I remained in the ditch for almost two hours. The ditch was several meters deep so I couldn't see what was happening but could hear the gunfire.

When I got out of the ditch I saw flames burning the village down. It was still dark but the sun was starting to come up. The flames colored the night.

I saw the attackers stealing our cows and goats. Others [other attackers] left to attack another village but by that time about 500 men from surrounding villages had assembled and were ready to attack the Arabs

but the Arabs, between 500 and 1,000, fled. Some villagers followed them while others reported the attack to the authorities. The authorities, though, never even came to our village.

I was to join the chase but first I went to [check] on my family. In the same compound, my father and mother and second father [his uncle, father's brother] had a tukul and my two elder brothers and their families also had *tukuls*. What I discovered was that my brothers had been killed, along with my grandfather and second father [his uncle]. All had been shot.

Others who were older than me collected the bodies of my brothers, grandfather, and second father and brought them to our *rakuba* (a shed with a single door). There were many other dead there. An imam said prayers over them. People, older people, washed the bodies, cleaned off the blood, and wrapped them in white cloth. They were then buried in a single grave and after they were covered with soil. A good stone [purposely made for graves] was brought and placed atop them. I was very hurt over the death of my brothers, grandfather, and my second father. Very angry.

Shortly after, two colleagues and I left the village and joined the SLM/A [Sudanese Liberation Movement/Army]. They sent me to Khartoum to train with the GoS [Government of Sudan] troops in order to see how they operated. I did not join as a Darfuri or as one whose relatives were killed [so as to be avoid] being detected. They allow anyone to join the army as long as he is from Sudan. I even told them I was from Darfur and that I was Massaleit, and they were OK with that. Author's note: Other refugees from Darfur said that such a situation was highly unusual, even to the point that it might not be true. Not knowing if the interviewee was being honest or not, but finding his story unique and potentially valuable if he, in fact, was telling the truth, the interview was included in this book.

I was trained by the GoS for one year. I was trained in a place called Karare. It was inside Khartoum but a place for soldiers. It was a military college, specializing in operations carried out with aircraft. I was specially prepared to be a commando who was to be dropped from aircraft with weapons. The training lasted a whole year. So that whole year I was trained I acquired a lot of knowledge about what the Arabs were planning to do as they fought the people of Darfur.

After I was trained for one year, I was to be taken far from Khartoum to fight. While on a work detail I tripped and fell and bit my tongue, slicing it open. The next week I had off—all got off a week after training before being assigned to battle—and I decided that week to refuse to go to battle. I used my injured tongue to convince the military doctors that I was ill. The military doctor informed the officers that I was not well and I was then taken to a military hospital. While in the hospital I decided I needed another plan [ploy] and so I decided to pretend [fake] that I was mad. I began striking and hitting all of the other soldiers who were ill. [Rollicking laughter of interviewee, interpreter and interviewer.] So, I was now taken to a civilian hospital. I gave some money to the civilian doctor I met with and he wrote

out that I could not be trusted with a weapon as I might shoot anyone, including fellow soldiers, and he [the doctor] gave that to the military officials. That document was called a *oornastisa* (a recommendation).

I was then taken to a hospital for mad people so that the military could keep an eye on me. As long as I was “sick” I was not allowed to fight but if the “madness” passed from my head I was to go fight in the region [Darfur] with my unit; so I was still in the military, still being paid but in the hospital for the mad. I remained in that hospital for one year.

In the mad house I let my hair grow long and my beard grow out and I went around acting like I was mad. Those who were really mad were tied down and given injections to sleep so it was not so dangerous. If any of the mad hit me I hit them, not hard. Once though I hit some and they [the hospital attendants] tied me up for two days. They arranged people by how mad they were. The maddest were far away from the least mad. I was put in the middle group (laughter).

Sometimes I was allowed to leave the hospital to go and spend a week with my relatives who lived in Khartoum and during that week I was fine, not “mad.”

After a year, the officials in the military assumed I was still mad and so I was released. At that time I began passing on all the information I had learned about how the Arabs operated. People from Darfur would travel to Khartoum and meet with me and take the information back. I remained in Khartoum from 2004 to 2005 providing information.

Even though I had left the military I still mingled with many of those I knew in the military. They still thought I was mad but enjoyed having me around.

So I just listened to what was being said. Sometimes the soldiers and commander would drink—whisky, beer, and wine—and they’d drink a lot and get drunk and say anything. I was on a mission so I had an advantage and I’d take down everything they said about Darfur. They’d say things like “The land in Darfur is good land and we need to move the blacks off and give the land to our people. If the blacks stay then they can only remain as slaves.”

At this time the military was planning a large attack on El Fasher and the head of the commandos was tasked with carrying it out. He was given 45 days to plan it and was given soldiers, planes, and weapons. I reported all of this to my colleagues from Darfur, and this was passed on to those rebel commanders in El Fasher.

So the rebels sent in snipers to El Fasher and they assassinated the commander of the GoS unit. And then the rebels attacked the airbase in El Fasher where all of the planes and other equipment were stored in preparation for the attack on El Fasher.

The MIGs were already loaded with bombs for the attack on El Fasher and there were armed GoS soldiers guarding the planes. The rebels left their vehicles outside the base and entered them at night and attacked.

Four MIGs were blown up by the rebels and some of the GoS soldiers were killed. This was in 2004.

In 2005 the government began to be very suspicious of anyone from Darfur—Massaleit, Zaghawa, Fur—and they began to interrogate people about why they were in Khartoum and what they were doing. If they thought you were guilty of anything you were killed. So, I kept to myself but did not try to leave right away, as I didn't want them to think I was guilty.

In 2006 I left Khartoum in the month of June. On the 25th I came directly here to Komu camp. I arrived on the 27th. My wife had already been in Komu for some months. For four years my wife and I and our three children have remained in Komu.

The SLM was very pleased with my work in Khartoum and would've been extremely pleased if I had remained with them, but here in Sudan when one's family members cannot care for their own family members—like my two brothers who were killed—it is expected that one take on the responsibility. So I had responsibilities I needed to tend to and so I left. And now, of course, I have my own family to care for too.

I went to Khartoum because I was so hurt and angry over the deaths of my brothers, grandfather, and my second father. I also went so that my children, all of the children of Sudan, could be free, live lives of freedom.

The people here in the Nuba Mountains are good. There was a war here in the 1990s and they know what it is like and so they treat us well.

The children of my elder brothers are in Chad, Gaga refugee camp. They are suffering and no one is supporting them so I am searching for a job abroad so I can earn money to assist them and my own children and wife.

Here I am left empty handed, with nothing. I do not even have enough to support my own family—and as I said I have relatives in Chad I am responsible for. So I hope the international community will come to help us so we can obtain an education so we can help ourselves.

Jamal Farouk Abdallah Abdulkadir was born on September 7, 1969, in Agume, West Darfur. He is a member of the Massaleit tribe. He has four years of education, and was a mechanic and a soldier in Darfur. He is married and has two children, a girl, who is six years old, and a boy, who is four years old.

The interview was conducted by Samuel Totten on July 13, 2010. Ramadan Tarjan served as the translator. The interview was conducted inside a roughshod school classroom adjacent to a tiny refugee camp, Komu, in the Nuba Mountains. Torrential rains pounded down on the tin roof and water splashed in the open door as the interview was conducted.

I grew up in the village of my mother, a village called Zaghawa—not a tribe, a village. Arabs used to come and take our animals. There were nomads who used to come and steal our animals and gather them up with

their animals. When we tried to stop them they threatened, injured, and killed our people. The nomads were armed, like militia, with GEM IIIs and Kalashnikovs. We had no weapons, just spears and *urbj* [pangas]. This happened frequently, continually between 1994 and 1998.

In 1998, the month of October, the enemy, the Arabs came and attacked Dithe, a neighboring village of Massaleit. The attack came at four o'clock in the morning. There were Arabs from Chad assisted by Osman Taha.¹⁷ The Arabs were from the Burgo tribe. That is the tribe of Ahmed Haroun.¹⁸ They were also from the Tama tribe. They lived in Darfur but they were given money to attack us.

After Dithe was attacked, people from Dithe raced on horses to our village to inform us of the attack. That was around six o'clock A.M. It was a custom that whenever a village in our area was attacked the men from the other villages would go and assist in the defense of that village. Men from our village went to help Dithe, and I was among them. As we approached Dithe I realized it was not good for all of us to leave our village [without defense] so I went back to our village and remained in our tukul [around hut made of mud with a conical, thatched roof] until twelve noon. Then I went to the *suq* as it was market day. Around two o'clock I was leaving the *suq* because it was time to pray. About a quarter past two the Arabs carried out an attack on our village. They came with camels, horses, trucks, and a tank.

I never reached home because when they attacked I rushed back to the *suq*. All the people in the *suq* were scattering and running, and I ran with them. None of us had weapons so we went to hide until the attack was over.

In the distance I saw the attackers, many with khaki shirts over their jalabiyas, others with khaki uniforms, and they were setting fire to the village. The attackers had not yet entered the *suq*. They attacked the *suq* after attacking the edges of the village.

There were about 300 people in the *suq*, and they ran off in all directions. There was a mountain nearby called Jebel Mulee, and I fled towards it. There were many, many people fleeing to Jebel Mulee. Mulee was a forest area and people hid amongst the trees and bushes. There was also a wadi.

¹⁷ Ali Osman Mohammed Taha has served as the Second Vice President of Sudan since August 2005. Previously, he served as First Vice President (1998 to 2005). Before that he was Sudan's Foreign Minister. Taha was tasked with overseeing the Darfur crisis from 2003 to 2004. Taha had close relations with Musa Hilal, head of the *Janjaweed*. In fact, Taha was responsible for obtaining Hilal's release from prison in 2003, and purportedly tasked Hilal with recruiting and commanding the *Janjaweed*.

¹⁸ Ahmed Haroun served as Sudan's Minister of the Interior and Sudan's Minister of State for Humanitarian Affairs. Haroun has been accused of helping to recruit, arm, and train Arab militia (*Janjaweed*) to carry out attacks on the people of Darfur. He is wanted for war crimes and crimes against humanity in Darfur by the International Criminal Court. In May 2009 Haroun was appointed to the governorship of South Kordofan.

I remained there, with others for one day and a half. I had no idea where my family was as I did not know the route they took during their escape.

When I left Jebel Mulee I returned to the village and all I heard was people crying, saying, "They killed . . .," and "My . . . was killed." Fifty-five people in our village were killed. Fifty-three men and a woman and her small child. One of the men was my uncle from my mother's side; his name was Yagub Abubaker. He was killed as he took the animals for water in the wadi. He was shot in the back, near the shoulder, and the bullet came out his chest.

We then buried the people. Twelve people were buried in each grave. It was not a good burial but we feared the enemy might return so we wanted to make sure everyone was [at least] buried. They were not prepared properly, not washed, not wrapped up or covered and an imam did not [preside] over their burial. A person there, though, did say prayers.

People were living in fear because we kept hearing that the Arabs were attacking this village today and that village tomorrow, so we didn't know if [or when] we would be attacked again.

In our village there were men who were considered heroes because they always defended our village and one of them was named Kongoor. He gathered the boys and young men to train them to defend our village, and I was among the young men taken. We were taken to a mountain called Jebel Serer. It was not military training but [rather] we were taught the values of our community, and virtues, and how and why we should defend our community. We were also taught about how to get the means to obtain weapons to defend our families. Each family was to give, if they had one, a cow to Kongoor who would then purchase the weapons with the money from the sale of the cows. If one didn't have a cow, sorghum was given to help purchase weapons.

When the Arab tribes, the Burgo and Tama, heard we were collecting weapons they would enter our villages in search of the weapons. When they found any, they took them. Soldiers would follow the Arabs into our village and provide security for them. The soldiers had the authority to come into our villages and take anything they wanted to so there was nothing we could do. And those weapons were not for fighting the GoS but for defending our animals, for protecting them from being stolen.

We were never trained to use the weapons. When we purchased the weapons the seller would show us how to load them and do this and this and this.

The GoS, along with the *Janjaweed*, continued to terrorize our villages. They kept returning to take our weapons and our animals. If you reported this to the authorities they would not even respond. The authorities were the ones who were giving orders to the soldiers to attack our villages. The authorities would take three days to come out to a village and by then the attackers were gone.

At the end of 1998, October or November, Kongoor was killed. He was riding on a horse and he was attacked by Arabs because they knew he

was the commander of security for the villages. He had just left the village of his wife, Majmare, on his way to the Majmare *suq*. He was shot and left there. That same day the Arabs attacked the *suq* and killed 19 men. Six women were shot but lived. The men were shot to kill them, but the women, they were shown some sympathy and not killed. The attackers looted the *suq*, taking everything they wanted, including animals.

At the beginning of 1999 Arabs attacked my village, Agume, again. It was in the middle of the night. I awoke to the sound of gunfire. Two of my relatives were killed: a brother to my mother, Abdurhman Hamad, and a cousin, Dokuja Alio Adam. The attackers stole their animals and stole animals from my father's brother, Abitha Abdullah Abdulkar, as well. They stole 37 head of cows from him. They didn't kill my him, but shot him in the knee. His wife, Riya Dinali, was shot, too, in the side, and the brother of his wife, Ismail Dinali, was shot and killed. They also stole 19 cows and one head of camel from me, as I kept my animals with my uncle's. They did not approach my tukul as they fled with the animals.

Throughout 1999, it was a continuous looting of animals. A continuous series of attacks by Arabs. Month after month the Arabs continued to attack and so the elderly people encouraged the boys and men to leave the village so they wouldn't be killed. The elderly told us, "You boys better leave as the Arabs want to finish you. It's better if you leave." So all of the young men left and went different places. Over 35 left that day, as I did, too.

I went to Habilah. I went there with two others and went there because I had relatives there. Sometimes I worked on the farm with them and sometimes I watched the animals. I remained there until 2000.

In 2000, winter, I returned to my village, Agume. I returned to my village because by that time Habilah was experiencing attacks by Arabs. But when I got there there was no one there as the village had been burned down. Totally. And anything of value had been carried off by the attackers. I heard that the attackers were GoS and the ones who put khaki shirts over their jalibiyas [the *Janjaweed*]. The Tama who used to live in the village stole all of the animals. The attack was against the Massaleit, Zaghawa, and Fur. Villages all over the area had been attacked and destroyed.

When I discovered the village had been destroyed and that I could not locate my family I decided to go to Chad. However, there were GoS everywhere and thus I could not make it to Chad. So, instead, I tried to return to Habilah but I could not make it there either because of the [presence] of so many GoS soldiers. So, I took the route to Mornei, but I did not enter the town because it was not safe. So, I continued on to Nyala. I went by foot to avoid roads so I could avoid the soldiers. On my way to Nyala I came across many dead bodies, bodies with bullet holes. Some places I'd come across three dead, sometimes two, and I even came across those who had been injured. From the injured I got advice about which routes I should avoid.

One person who was injured told me about a person who had attacked them. The attacker's name was Suqkurtala. He was head of the command of Jesh [the GoS military]. This man was under Ahmed Haroun. Suqkurtala was a commander of soldiers, but also cooperating with the Janjaweed. He worked closely with Ali Koship¹⁹ and Musa Hilal, the head of Janjaweed.

I was advised that if I got caught by soldiers not to tell them I was Massaleit as they would kill me. I was told it was better to say I was Tama or Burgo.

I reached Nyala in eleven days. It took so long because when you hear gunfire you must hide and wait until it is safe. I remained in Nyala for one week. I knew a fellow who drove a lorry transporting goods from Nyala to Khartoum. I traveled to Khartoum but did not remain there. I continued to Kadrif, where I had relatives. I remained there from 2001 to 2004.

While there I discovered that the GoS was convincing young men of the Tama tribe to go and fight in Darfur. There was a sheik named Kharmla, who was head of the chiefs, and he called all of the Arab leaders together who supported the GoS, and he told them: "Those people—the Massaleit, Fur, and Zaghawa—now in Darfur are taking your land. They are not from Sudan and should not be there. If you go fight them and send [chase] them away the land will be yours." A man named Majdi, who had the rank of a star and an eagle—higher than a major general—recruited many boys [young men] to go fight in Darfur. I know so many boys [young men] who were taken to Darfur. They were first taken to a military base in Khartoum, Fatisha, to be trained, and then they were sent to Darfur.

After six months they returned to Kadrif and talked about what they had done in Darfur. I just listened to them, not commenting. They said that in Darfur if you wanted a woman you just go out and find one and rape her. I asked them, "How do the men feel about their wives and daughters being treated in that way?" They said, "They can't do anything. . . . If they say anything, we just finish them."

They also said, "Up above is heaven [God] but on the ground is Omar Bashir." They said, "Only the soldiers has the power, no one else can talk [have a say about what takes place in Darfur]."

They said that if they go out to a village in Darfur and they found newborn babies, they spread the legs. If it was a girl, they left it. If it was a boy, the dipped his legs in boiling water and they threw him up in the air and caught him on the bayonet at the end of the rifle.

¹⁹ A high-ranking *Janjaweed* leader, Ali Koship is wanted by the International Criminal Court (ICC) for over 40 counts of crimes against humanity and war crimes, for directing and taking part in killings, rape, destruction of villages, and forcible displacement of black Africans in West Darfur. During 2003–2004, Koship was the most senior commander in the Wadi Saleh area in West Darfur.

They also said. "Those people [the black Africans] in Darfur don't respect themselves, and we must finish them. We must finish them completely." They said that if they weren't able to finish some in a village and they [the villagers] remained in the village, other tribes such as the Tama would come in and finish them.

After all I heard I felt so bad I left and returned to my birth area. I discovered that others had been settled on our land—people from Chad, Senegal, and Cameroon. The people from Chad were *Janjaweed*, and they were brought in by Osman Taha and Sheik Abudallah Karmila.

Again, I tried to get to Chad but the roads were blocked by the GoS and Janjaweed. So, I returned to Nyala and then to here. It took many months to reach here. I walked on foot and it took a long time. I arrived here in 2006, the month of July.

There were about 1,113 people here then. I was among the first here. Refugees from Darfur arrived in 2005 but they were not given a camp; they stayed in Kauda [the village adjacent to where the camp is now located].

I've been waiting for four years for the case of Darfur to be solved. But we are being bothered even as we wait; Omar al-Bashir is sending spies into the camp to live among us. It is not only happening here but in other camps—IDP camps and refugee camps. They have money they give people to start their own businesses and then they start taking information from you. Or, if you are weak, they will give you cash and then make you give them names and information. When they get the information they leak it outside and then the people, the refugees, begin fighting among themselves. That is what al-Bashir wants, to make the refugees look bad. This area [the Nuba Mountains] is now integrated with the SPLM [Sudan People's Liberation Movement] and the GoS and so GoS the soldiers even drive into camp sometimes and ask for a driver. If they hire someone they pay them very well and the person then begins to feel comfortable and may start giving information.

Even if they [the GoS] say we can solve the problem in Darfur they will send people from the north who wish to try to take over again and claim the land they want. If that happens the fighting will continue.

Abdulkarim Adam Mohammed was born on May 7, 1941, in El Genenia, Darfur. He is a member of the Massaleit tribe. He has five years of education, and is a farmer. He is married, with four wives and seventeen children.

The interview was conducted by Samuel Totten on July 20, 2010. Ramadan Tarjan served as the translator. The interview was conducted outside a tiny refugee camp on the outskirts of the village of Kauda in the Nuba Mountains. It was conducted under a large tree overlooking a plain of grass that swept up to a steep, dusty mountainside. The interviewee wore a white jelabya.

Beginning in 1992, the Arabs often came and stole animals from the Massaleit. I was sitting in a gathering place [a place where animals grazed] in

the month of March 1992, and the Arabs came on horses. The horses were carrying two people [each], and there were about 60 horses. Our cows were drinking water. The Arabs opened fire, shooting in the air but not at people. Kalashes [Kalashnikovs], and GEM IIIs. They stole 320 cows. At that time we had no guns, only spears so we could not try to prevent the theft of our animals.

We reported the theft to the head of police, an Arab, and he said they did not have a truck. So, they did nothing.

We then went to Masteri because the police there were from the indigenous people. Five of the police were from our village. They rode on horses to search for the thieves and they reached them. About fifty Arabs had broken off from the main group and hid in the bushes. The others continued with the animals. The 50 Arabs attacked our boys [the police], and all five of our boys were killed.

The people gathered and said, "Now we know the Arabs attack us and when we report it to the police nothing happens." We had no weapons so we decided that if one had 50 head of cattle he had to give five to the head of the village so he could purchase weapons.

That money was used to purchase weapons, Kalashes, and petrol so if we were attacked we could put it in the trucks and chase them down. [Editor's note: The interpreter explained that when anyone wishes to hire a truck he/she has to provide petrol for the vehicle so the village stocked the petrol in the event of an attack.] When Omar al-Bashir realized the people purchased weapons to defend themselves he organized a group, the *Janjaweed*.

Omar al-Bashir organized the Arabs from that region and the north and he told them, "These black people, you are to finish them!" Omar al-Bashir gave the Minister of Defense Ahmed Haroun²⁰ the power to obtain and distribute any weapons he wanted to finish off the blacks. Ahmed Haroun then gave the weapons to the head of the *Janjaweed*, Ali Koship. Koship received the weapons and gave them to Arabs. Koship told the Arabs, "Take these weapons and finish these people in this region: El Geneina, El Fasher, and Nyala. Not just the Massaleit but all black people: Zaghawa, Fur, and Massaliet. Finish them!" [Author's note: The aforementioned places are the three capitals of the three Darfur states, thus inferring that "the region" refers to all three states.]

²⁰ Haroun never served as Minister of Defense. He served as Sudan's Minister of Interior and Sudan's State Minister for Humanitarian Affairs. That said, the interviewee is correct that Haroun had a hand in the Darfur crisis. More specifically, Haroun coordinated various government entities involved in the counter-insurgency in Darfur, including the GoS military forces, the police, the *Janjaweed*, and the National Security and Intelligence Service. Allegedly, Haroun recruited, paid, and armed the *Janjaweed* and incited attacks against civilians in the Darfur region. He is now wanted by the International Criminal Court on over 40 charges of crimes against humanity and war crimes.

When the *Janjaweed* attacked they were allowed to steal anything they wanted. When the *Janjaweed* attacked if they found a mother and daughter they used them openly [meaning, raped them in the open]. All were raped, all ages, young and old. Girls of ten and eleven were raped. There were many *Janjaweed* doing that.

The attacks by the *Janjaweed* continued month after month and year after year in the region. But now we, black Africans, tried to defend ourselves.

In 1993, June, the *Janjaweed* attacked my mother's village, Mangu, east of Beida. I was there visiting my mother. The Arabs arrived on horses but many were riding on trucks. Those on horses were *Janjaweed* and those on trucks were Omar Bashir's men. It was around 8:00 in the morning. I was in a tukul [a traditional mud abode with a conical thatched roof] with my mother, one of my wives, and a brother-in-law and his brothers, plus their father. All of a sudden we heard weapons firing. All the women fled, running, and the men gathered to try to figure out how we could help ourselves.

The first to open fire were *Janjaweed*. We only had spears so we dispersed and hid among the tukuls and when the *Janjaweed* rode by we attacked them with the spears. I had three spears. I was hiding behind a large tree. I saw a GoS soldier with three stars walking with a small gun giving orders to his men, waving a stick [a baton], shouting, "Go this way!" and "Over there!"

I threw my first spear and missed. With the second I hit him. I speared him in the neck and he fell to the ground. Dead. I killed him

There were many GoS soldiers around, and they saw me kill their colleague and they surrounded me and took me captive. They tied my hands.

One asked me, "Why did you kill him?"

I answered, "Why do you always come and terrorize our people? I was trying to defend our village."

One soldier then approached us with a Kalash with a knife [bayonet] on the end and he speared me in the rib cage. I fell and blood was gushing out. He was ready to finish me, but another soldier said, "Just leave him. He's tied up, just let him suffer."

There was a big tree and they dragged me under it. Many GoS soldiers were there. About one hour later some of our people attacked. The soldiers opened fire and there was fierce fighting. Some were killed and some were captured. Of our people, about 60 were killed—not just from our village but neighboring villages [as well]. Of the 60 who were killed, there were four women.

After the fighting was over the men from my village plucked the leaves of a Boro tree and they boiled them. They took a piece of cloth, dipped it in the water and cleaned my leg. They also took the seeds of a Jag Jag [pronounced jug jug] tree and gave them to me to swallow. They took the

bark from the Jag Jag tree and placed it on the wound to help it heal. They tied a piece of cloth around the bark and my chest to hold it. With time, the wound healed.

Those who came and killed were soldiers so there was *no one* to report them to.

Some soldiers caught were Syrians, Yemens, and Jordanians. We didn't know they were from those countries but when they were questioned and pressed they told us. When we asked them, "How did you come here?" they said, "We were told we were going to a petrol [oil] mining area to guard the oil."

They said they were brought there by the GoS. They didn't know where they were going [where the oil fields were located] and somehow they were mixed in with the *Janjaweed*. They didn't have uniforms but had on camouflage. People who had come from other villages to assist us said, "Let's kill them!" Others said, "No!" Some others said, "Let's make a fence [a corral] and hold them here." [Still] others said, "Let them go." They were taken away but I don't know where they were taken. Perhaps, since many of our people were killed, they were killed too. But I am not sure since I was not with them because I was injured.

Among those killed in my family: the father to my wife, six brothers of the father to my wife, and four [of my] brothers. The village was destroyed, totally. It was burned to the ground.

After the attack, the village [people] gathered and decided this was no good. The Arabs kept attacking villages and those places where people fetch water [the wadis], and so they decided to leave the area and go south. My wife and I returned to our village in Guribedia. Six months after we returned a village next to us, Gemiza, was attacked by Arabs. There was a *suq* there and the *suq* was attacked, and even the village. They [the GoS] took many soldiers from Geneina to attack the village. There were some *Janjaweed* but mainly soldiers. They put fire to the village, the *tukuls*. Only six *tukuls* were left standing out of 90.

There was heavy fighting, shooting, and people fled to our village. The GoS followed them, chased them. The men in our village left the village, hid themselves, and ambushed the soldiers as they entered the village. I fought, too. I had a rifle that carried five bullets. When I ran out I took a weapon, a Kalash, from a friend who had been killed. The GoS shot 130s and the shells hit the village. Then the GoS opened fire with GEM IIIs, Kalashes, and RPGs [rocket-propelled grenades]. It was a heavy battle. Finally, the GoS retreated and left. We had killed sixteen of them, GoS and *Janjaweed*.

Attacks like this kept taking place year after year until 2003. Many people kept dying. People would flee to nearby mountains, for security [safety], and then return. No one at that time [in the 1990s, 2000-2002] fled to Chad. The worst came in 2003.

In 2003, January, there was a big attack. There was a town, Tirbaba, near our village, that had a big *suq*. There were about 3,000 people in Tirbaba. The GoS came through Habila or Beida town, entered Chad, and then returned to Darfur and attacked Tirbaba. They looted the *suq*. It took them four days to loot everything. They had big trucks driven by *Jesh* to carry everything away. The goods of the people from the villages—Gemiza, Kukaya, Ngarama, Kurache, Guribeida, Ager Jambi, Kurti, Ngoro, Dabala, Abuna—were all taken to Tirbaba. It was on the border of Chad. A big town and it had a lot of police. The people believed they could flee to Chad if there was an attack. And they did. Both when the looting was taking place and when the attackers put fire to the *suq* and the *tukuls* people fled to Chad. The people fled to Gaga, Bredjing, Farchana, and even Gos Beida [all of which are refugee camps inside Chad along the Chad/Sudan border]. People first fled to a wadi, Wadi Kacha, and crossed over to Chad.

This was the attack when Antonovs [Russian-made transport planes that the GoS often used as makeshift bombers] bombed us. On the first day the Antonovs did not come. Those soldiers who entered came on foot. There were trucks but they left their vehicles in Beida, crossed into Chad on foot, and then attacked on foot. If they had gone into Chad with vehicles the Chadian government would have known. The only ones on horses were those with rank. The rest were on foot. The *Janjaweed* were on horses, too.

The villages battled the attackers and fired on them. The soldiers retreated and then the Antonovs came, on the second day. The bombs were meant for anybody who was black. They were sent by Omar al-Bashir to finish us, the black people.

People who were fleeing were killed. Some women who were pregnant were so fearful they gave birth to their babies prematurely. One I actually witnessed. Another woman fell on her [pregnant] stomach and died.

There was another woman who had given birth and she started a fire to warm water to wash and comfort herself. The *Janjaweed* saw the fire and went to her *tukul*. One asked her if the child was male or female. She said, "Male." This *Janjaweed* who was black was somehow good and said in a soft [hushed] voice, "Don't tell the others the baby is male. Tell them it is female."

A lighter man [soldier or *Janjaweed*] came in and said, "I think you are lying. I think the baby is male." He yanked the baby by the legs, spread the legs [and seeing that it was a boy] plunged the baby in the boiling water headfirst and held it down, killing the baby.

By then the rebels of Ibrahim Khail²¹ had formed and they heard about the fighting and raced to the village to help the villagers battle the GoS

²¹ The chairman of the Justice and Equality Movement (JEM).

and *Janjaweed*. The rebels fought them and chased them into the desert. The people then had an opportunity to come down from the mountain and when they did they fled to Chad.

I, myself, did not flee to Chad. I remained in the mountains from 2003, 2004 and 2005. There were caves, a big one that you can walk in, and there was water. I was there with my family and others, about 100 people. We hunted for gazelle, guinea fowl, and even cats, cats that were usually domestic but these were wild. We mixed the leaves and the meat and ate stew.

We were not attacked in the mountains. Never. Because they did not know we were up there.

We heard that Omar al-Bashir brought in about 23,000 from Niger to replace all of the people [black Africans] who were forced off their land. These people from Niger were given land and even weapons. They took over all of our farms and our mango trees [orchards] and have settled in El Geneina.

The conditions in the mountains began to deteriorate. There was not enough food, no medical help for those who were sick, and no education for the children. Without education there is nothing; it is the key to life. So we left the mountain—all 100 people—and we came here to Kauda. We left at night and walked at night and rested and hid during the day. We finally reached Mornei and took a bus east and alighted in Nyala. We then continued on to El Obeid on to Kaldugli and from Kaldugli to here. All by bus and lorries. The SPLA [Sudan People's Liberation Army] government brought us here. The SPLA told us, "We have suffered the way you have as well [at the hands of Omar al-Bashir and the GoS]. If you agree, we will bring you to a place near a suq. And so they brought us here."

We heard that the people who went to Chad are suffering; that there is not enough for their needs. So we came here.

Life is better here. There is no conflict, and even children are going to school now. NGOs, like Samaritans [Samaritan's Purse] and UNICEF, are standing by us. I can even work for a living. I can go to Kauda [the center of Kauda, which is several miles from the refugee camp] and build bricks and earn money to purchase food and clothes for the children.

We are just waiting for the situation in Darfur to improve. If the U.S. says, "It [Darfur] is open," we are ready to go, to return to our homes.

I only hope Allah will bring Omar Bashir, Ahmed Haroun, Ali Koship, and others who support them to justice. I hope the good people of the world will bring Omar al-Bashir to justice just like the world did Saddam Hussein [the interviewee drew his hand across this throat as if he were slashing it].

All of us are praying that Omar al-Bashir, Ahmed Haroun, Ali Koship and other ministers are all hanged. I also hope God will give power to Luis Ocampo [the prosecutor at the International Criminal Court].

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An Oral and Documentary History of the Darfur Genocide

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An Oral and Documentary History of the Darfur Genocide

Volume 2

SAMUEL TOTTEN

Praeger Security International



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This book is dedicated to my wife, Kathleen M. Barta, for her loving, gracious, and indefatigable support for the work I do in the places I do it, and to all of the black African civilians of Darfur who have lost more than most can imagine as a result of the violence visited upon them by the Government of Sudan, its troops, and the *Janjaweed*.



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Introduction

The documents in this volume all address, in one way or another, the issue of whether the actions of the Government of Sudan, its troops, and the *Janjaweed* (Arab militia) in Darfur constitute genocide. Almost from the outset of the international community's attention to the crisis in Darfur (late 2003/early 2004), controversy raged over whether the black Africans of Darfur were being subjected to genocide, crimes against humanity, war crimes, and/or ethnic cleansing. Some seven years later (August 2010), the controversy in relation to whether the atrocities constitute genocide continues unabated. Indeed, there is disagreement among scholars who study genocide, officials within the same state governments, the prosecutor and various judges at the International Criminal Court (ICC), and even the ICC judges themselves.

In order to provide readers with a ready reference about how the international community (meaning, the United Nations, ad hoc criminal tribunals, and the International Criminal Court) defines genocide, a copy of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) is included herein.

The first official declaration that Sudan's actions in Darfur constituted genocide was issued by the United States government. During the summer of 2004, the United States sponsored a field-based study of the crisis. In doing so, the U.S. State Department hired the Coalition of International Justice to head up a project to conduct interviews with black African refugees who had fled to refugee camps in Chad following attacks on their villages in Darfur. Over the course of four weeks in July and August 2004, twenty-four investigators conducted over 1,100 interviews using

an eight-page questionnaire developed by the U.S. State Department and various human rights and legal consultants. (For a discussion of the Atrocities Documentation Project and its findings, see Samuel Totten and Eric Markusen's *Genocide in Darfur: Investigating Atrocities in the Sudan*. New York: Routledge, 2006). The second document in this volume is a copy of the U.S. State Department's report, "Documenting Atrocities in Darfur."

On September 9, 2004, following a detailed and critical analysis of the data collected by the Atrocities Documentation Project, U.S. Secretary of State Powell informed the U.S. Senate Foreign Relations Committee that "We concluded—I concluded—that genocide has been committed in Darfur and that the government of Sudan and the Janjaweed bear responsibility—and genocide may still be occurring." Powell's speech to the Senate Foreign Relations is the third document in this volume.

Following the United States' investigation and declaration vis-à-vis the atrocities perpetrated in Darfur by GoS troops and the *Janjaweed*, the U.S. Government, under Chapter VII of the UN Charter, referred the matter to the United Nations. Subsequently, the United Nations carried out its own investigation in November and December 2004 and January 2005. Instead of limiting itself to interviewing the refugees in refugee camps in Chad, the UN sent its investigators to the following locations to speak with the following individuals: Darfur, to interview black African villagers, internally displaced persons, local government officials, and witnesses in detention centers; Khartoum, to interview government officials, nongovernmental organization personnel, officials of various political parties, UN personnel, and "interested foreign government representatives in Sudan"; Eritrea, to speak with black African rebel leaders associated with the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), and former Sudanese government officials; and Addis Ababa, Ethiopia, to speak with officials of the African Union, the African Mission in the Sudan (AMIS), and those involved in the Inter-Sudanese talks in Abuja.

In late January 2005, the UN Commission of Inquiry on Darfur (COI) submitted its final report, and therein declared that while the atrocities committed by the GoS and *Janjaweed* were horrific, they did not, in the COI's estimation, rise to the level of genocide but rather crimes against humanity. The UN Commission of Inquiry on Darfur is the fourth document in the book. (For a discussion of the UN Commission of Inquiry in Darfur and its findings, see Samuel Totten's "The UN International Commission of Inquiry on Darfur: New and Disturbing Findings." *Genocide Studies and Prevention: An International Journal*, Winter 2009, 4(3):354–378).

Subsequently, the United Nations referred the matter to the International Criminal Court (ICC). The ICC then proceeded to carry out its own

investigation. Under the direction of ICC Chief Prosecutor, Luis Moreno-Ocampo, the ICC spent untold hours over several years conducting its investigation. Ultimately, Moreno-Ocampo concluded that Sudan had committed genocide in Darfur, and on July 14, 2008, he applied for a warrant for Sudanese President Omar al-Bashir's arrest on charges of crimes against humanity, war crimes, and genocide. The request for the warrant—"Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad al Bashir"—is the fifth document included herein.

Following its examination, analysis, and discussion of the prosecutor's application for a warrant to arrest al-Bashir on charges of crimes against humanity, war crimes, and genocide, the majority of ICC judges (two of the three) rendered a decision, on March 4, 2009 that resulted in the warrant charging al-Bashir with crimes against humanity and war crimes, but not genocide. Their decision—the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"—is one of two documents that constitute the sixth entry in this volume. The second document is ICC Judge Anita Usacka's powerful dissent that delineates why she believes Chief Prosecutor Moreno-Ocampo's request for a warrant on charges of genocide makes sense and should be honored.

Vehemently disagreeing with the majority's decision, Prosecutor Moreno-Ocampo filed an appeal on July 6, 2009 contesting the dismissal of his application for a warrant to arrest al-Bashir on charges of genocide. Therein, he spells out why he thinks the majority opinion/decision was wrong. That document, "The Prosecutor's Appeal Regarding Dismissal of his Application for a Warrant of Arrest for Omar al Bashir," is document seven in the volume.

The next document in the volume ("The Appeals Chamber of the International Criminal Court, Judgment on the Appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'" of 4 March 2009) spells out the decision by the Appeals Chamber of the International Criminal Court (made on February 3, 2010) regarding the prosecution's appeal of the majority decision vis-à-vis his application for an arrest warrant on the charge of genocide against al-Bashir. Therein, the ICC Appeals Court spells out why it ordered the ICC judges to reconsider the prosecutor's request and thus decide anew whether the arrest warrant should be revised to include the charge of genocide. In doing so, the Appeals Chamber makes it clear that it is not concerned with the issue of whether al-Bashir is responsible for the crime of genocide, but rather procedural law (i.e., whether the Pre-Trial Chamber applied the correct standard of proof when rendering its final decision vis-à-vis the Prosecutor's application for an arrest warrant on the charge of genocide).

The last document in the volume is titled "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir." On July 12, 2010, the Pre-Trial Chamber

I of the International Criminal Court (ICC) issued a second warrant of arrest, and did so after it came to the conclusion that there were reasonable grounds to issue a second warrant for al-Bashir's arrest, this time for genocide. The new warrant includes three counts of genocide (genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction), all relating to the systematic attacks by the GoS military forces and *Janjaweed* against the Fur, Massaleit, and Zaghawa ethnic groups.

This second warrant proved to be a victory of sorts for ICC Prosecutor Luis Moreno-Ocampo, who had filed an appeal protesting the fact that the initial warrant issued on March 4, 2009 by the ICC judges neglected to include the charge of genocide. The Prosecutor filed his appeal on July 6, 2009, and on February 3, 2010, the Appeals Chamber rendered its judgment ("Judgment on the Appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'") on the Prosecutor's appeal, reversing, by unanimous decision, Pre-Trial Chamber I's decision of March 4, 2009.

The ICC duly noted that "[t]his second arrest warrant does not replace or revoke in any respect the first warrant of arrest issued against Mr. Al Bashir on 4 March, 2009, which shall thus remain in effect." The initial arrest warrant charged al-Bashir with five counts of crimes against humanity (murder, extermination, forcible transfer, torture, and rape) and two counts of war crimes (intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities, and pillaging).

As the ICC case against al-Bashir unfolds, additional documents will be created that address whether the actions committed by Sudan in Darfur constitute genocide. Be that as it may, the documents included herein constitute the major documents developed to this point in time (August 2010).

Documents

DOCUMENT 1

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) was adopted by the United Nations General Assembly on December 9, 1948. The UNCG contains the definition of genocide that the international community (e.g., the United Nations, individual states, ad hoc criminal tribunals, the International Criminal Court, international lawyers) uses in analyzing and prosecuting alleged cases of genocide.

Some scholars have referred to the UNCG definition of genocide as a “compromise definition.” That is due, in part, to the fact that during the early hearings on the UNCG some groups that had been listed as being protected under the UNCG were later excluded. A classic example is that of “political groups.” Ultimately, national, ethnical, racial and religious groups are specifically mentioned in the UNCG but political groups are not. Political groups were eventually dropped from inclusion in the UNCG due to the objections of various countries, including, most notably, the USSR.

The UNCG has also been criticized for its murky and ambiguous language. For example, untold arguments have raged over the wording “in whole or in part.” In regard to the wording “in part,” most now agree that it must be in reference to a substantive number. Be that as it may, there are now arguments over that which constitutes “substantive.”

Numerous scholars have devised their own definitions of genocide, but when it comes to international law and the prosecution of alleged genocidares, the UNCG’s definition is the one, and only, definition that matters or counts at this point in time.

The UNCG was included herein due to the fact that it is mentioned in many of the documents in this volume. Readers may wish to refer to the UNCG as they attempt to try to understand the thinking behind the wording, commentary and decisions outlined in the various documents.

**CONVENTION ON THE PREVENTION AND
PUNISHMENT OF THE CRIME OF GENOCIDE,
UNITED NATIONS, ADOPTED BY RESOLUTION
260 (III), DECEMBER 9, 1948**

ARTICLE I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

ARTICLE III

The following acts shall be punishable:

- a. Genocide;
- b. Conspiracy to commit genocide;
- c. Direct and public incitement to commit genocide;
- d. Attempt to commit genocide;
- e. Complicity in genocide.

ARTICLE IV

Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

ARTICLE V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

ARTICLE VI

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

ARTICLE VII

Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

ARTICLE VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

ARTICLE IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

ARTICLE X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

ARTICLE XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

An Oral and Documentary History of the Darfur Genocide

Volume 1

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be in force as from the date on which the last of these denunciations shall become effective.

ARTICLE XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in Article 11 of the following:

- a. Signatures, ratifications and accessions received in accordance with Article 11;
- b. Notifications received in accordance with Article 12;
- c. The date upon which the present Convention comes into force in accordance with Article 13;
- d. Denunciations received in accordance with Article 14;
- e. The abrogation of the Convention in accordance with Article 15;
- f. Notifications received in accordance with Article 16.

ARTICLE XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in Article 11.

ARTICLE XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

DOCUMENT 2

In July and August 2004, the United States State Department sponsored an investigation (the Atrocities Documentation Project or ADP) into the ongoing crisis in Darfur, Sudan. In doing so, it hired the Coalition for International Justice (CIJ), a Washington D.C. based nongovernmental organization, to head up the investigation. As a team of consultants from various human rights organizations assisted the State Department in developing a questionnaire to be used by the investigators in interviewing refugees who had fled the violence in Darfur, CIJ began hiring the twenty four investigators needed for the project.

Once in Chad, each investigator was paired with an interpreter who spoke Arabic and at least one of the tribal languages spoken by the groups (Massaleit, Zaghawa and/or Fur) being targeted by the government of Sudan and the Janjaweed (Arab militia). Each and every investigator used the same eight-page questionnaire and asked each and every question on the questionnaire. The interviews ranged in length from an hour to two hours with the average being about an hour and a half.

The major focus of the interviews was to collect information about what the interviewees had personally experienced and/or witnessed with his/her own eyes vis-à-vis the violence in Darfur. Questions included, for example, why the interviewee thought his/her village was attacked; the date and time of day of the attack(s); those involved in the attack(s); what transpired during the attack(s); what, if anything, was said by the perpetrators, to the victim and victim group during the attack(s); what the perpetrators were wearing; the types of weapons the perpetrators wielded; whether the interviewee was beaten, shot, raped or otherwise injured; whether family members were beaten, shot, raped, or otherwise injured and/or killed; what transpired between the time the interviewee fled his/her village and arrived at the refugee camp in Chad, et. al.

By the conclusion of the investigation, the investigators had conducted over 1,100 interviews. Individually, the U.S. State Department and an outside agency collated, tabulated, and analyzed the findings. The analyses were presented to US Secretary of State Colin Powell, who consulted with State Department personnel and Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes, in his effort to come to a determination as to what the data added up to according to international law.

The ADP report is included herein as it constitutes the first official investigation by a sovereign nation (the United States) of an ongoing case of mass violence for the express purpose of ascertaining whether genocide had been perpetrated or not. (For a detailed discussion of the genesis, implementation and findings of the ADP, see Samuel Totten and Eric Markusen's Genocide in Darfur: Investigating Atrocities in the Sudan. New York: Routledge, 2006. For a detailed statistical analysis of the findings of the ADP, see John Hagan's and Weona Rymond-Richmond's Darfur and the Crime of Genocide. New York: Cambridge University Press, 2009.)

**DOCUMENTING ATROCITIES IN DARFUR, U.S.
STATE DEPARTMENT'S BUREAU OF DEMOCRACY,
HUMAN RIGHTS, AND LABOR AND BUREAU OF
INTELLIGENCE AND RESEARCH, STATE PUBLICATION
11182, SEPTEMBER 9, 2004**

SUMMARY

The conflict between the Government of Sudan (GOS) and two rebel groups that began in 2003 has precipitated the worst humanitarian and human rights crisis in the world today. The primary cleavage is ethnic: Arabs (GOS and militia forces) vs. non-Arab villagers belonging primarily to the Zaghawa, Massalit, and Fur ethnic groups. Both groups are predominantly Muslim.

A U.S. Government project to conduct systematic interviews of Sudanese refugees in Chad reveals a consistent and widespread pattern of atrocities committed against non-Arab villagers in the Darfur region of western Sudan. This assessment is based on semi-structured interviews with eleven hundred thirty six randomly selected refugees in 19 locations in eastern Chad. Most respondents said government forces, militia fighters, or a combination of both had completely destroyed their villages. Sixty-one percent of the respondents witnessed the killing of a family member; 16 percent said they had been raped or had heard about a rape from a victim. About one-third of the refugees heard racial epithets while under attack. Four-fifths said their livestock was stolen, nearly half asserted their personal property was looted. This assessment highlights incidents and atrocities that have led to the displacement of large portions of Darfur's non-Arabs.

An Atrocities Documentation Team (ADT), assembled at the initiative of the U.S. Department of State's Bureau of Democracy, Human Rights,

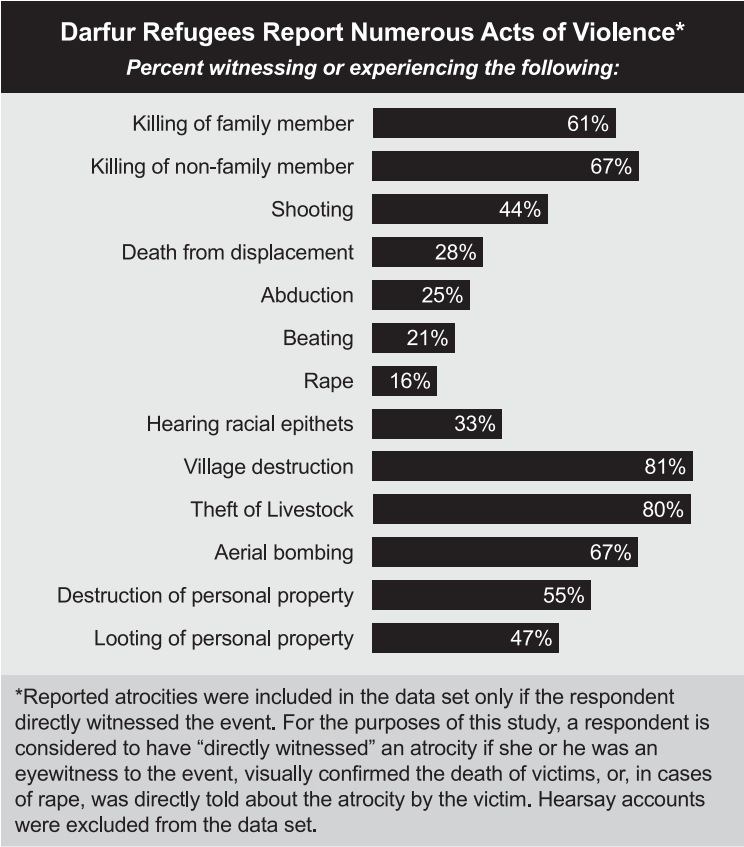
and Labor (DRL), conducted interviews in Chad in July and August. The team was primarily composed of independent experts recruited by the Coalition for International Justice (CIJ), and also included experts from the American Bar Association (ABA), DRL, and the State Department's Bureau of Intelligence and Research (INR) as well as the U.S. Agency for International Development (USAID). INR was responsible for compiling the survey data and producing the final report. USAID met the costs of the CIJ and ABA.

HUMANITARIAN CRISIS

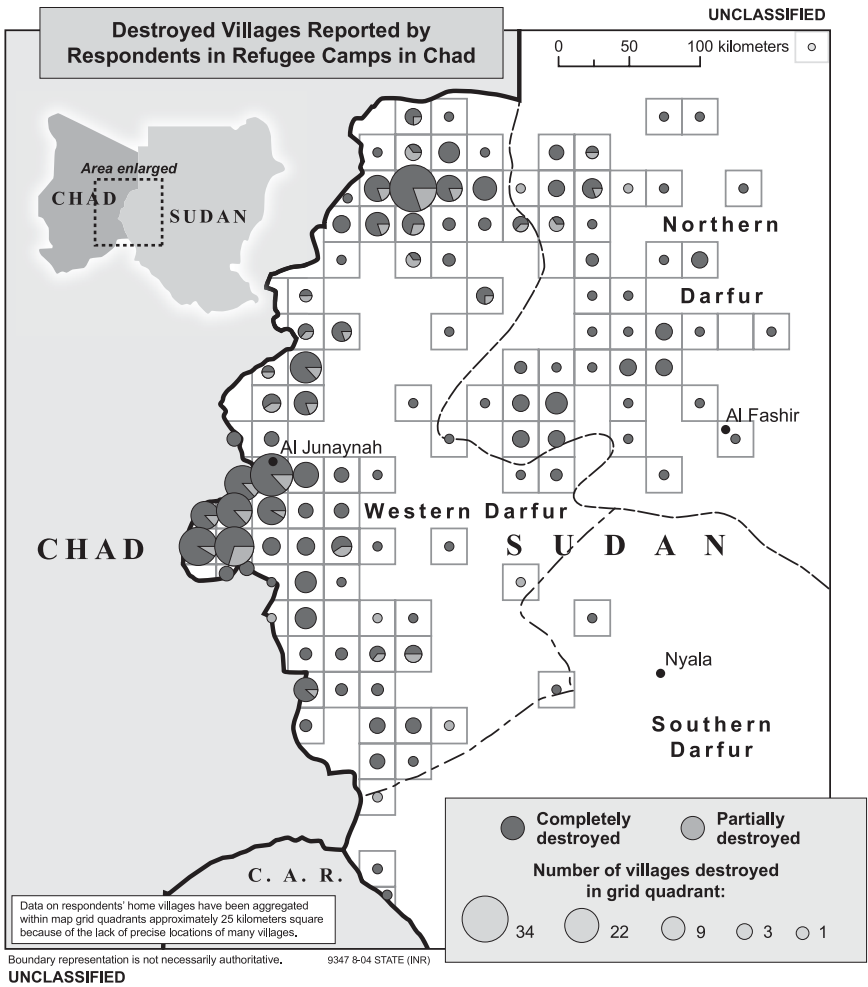
As of August 2004, based on available information, more than 405 villages in Darfur had been completely destroyed, with an additional 123 substantially damaged, since February 2003. Approximately 200,000 persons had sought refuge in eastern Chad as of August, according to the UN High Commissioner for Refugees (UNHCR); the UN Office for the Coordination of Humanitarian Affairs reports another 1.2 million internally displaced persons (IDPs) remain in western Sudan. The total population of Darfur is six million. The lack of security in the region continues to threaten displaced persons. Insecurity and heavy rains continue to disrupt humanitarian assistance. The UN World Food Program provided food to nearly nine hundred forty thousand people in Darfur in July. Nonetheless, since the beginning of the Darfur food program, a total of eighty-two out of one hundred fifty four concentrations of IDPs have received food, leaving seventy-two locations unassisted. Relief and health experts warn that malnutrition and mortality are likely to increase as forcibly displaced and isolated villagers suffer from hunger and infectious diseases that will spread quickly among densely populated and malnourished populations. The health situation for the two hundred thousand refugees in Chad is ominous. The U.S. Centers for Disease Control and Prevention estimate that one in three children in the refugee settlements in Chad is suffering from acute malnutrition and that crude mortality rates are already well above emergency threshold levels (one per ten thousand per day).

HUMAN RIGHTS CRISIS

The non-Arab population of Darfur continues to suffer from crimes against humanity. A review of 1,136 interviews shows a consistent pattern of atrocities, suggesting close coordination between GoS forces and Arab militia elements, commonly known as the Janjaweed. ("*Janjaweed*" is an Arabic term meaning "horse and gun.")



Despite the current cease-fire and UN Security Council Resolution 1556, Janjaweed violence against civilians has continued (cease-fire violations by both the Janjaweed and the rebels have continued as well). Media reports on August 10, 16, and 19 chronicled GOS-Janjaweed attacks in Western Darfur. In addition to their work on the survey, the interviewers had the opportunity to speak with newly arrived refugees who provided accounts that tended to confirm press reports of continuing GoS participation in recent attacks. Refugees who fled the violence on August 6 and 8 spoke with the team, providing accounts consistent with media reports: joint GoS military and Janjaweed attacks; strafing by helicopter gun ships followed by ground attacks by the GoS military in vehicles and Janjaweed on horseback; males being shot or knifed; and women being abducted or raped. Respondents reported these attacks destroyed five villages. Multiple respondents also reported attacks on the IDP camp of Arja.



The UN estimates the violence has affected 2.2 million of Darfur's 6 million residents. The GoS claims it has been unable to prevent Janjaweed atrocities and that the international community has exaggerated the extent and nature of the crisis. The GoS has improved international relief access to IDPs in Darfur since July, but problems, including lack of security and seasonal rains, have hampered relief programs. Survey results indicate that most Sudanese refugees state that Janjaweed militias and GOS military forces collaborate in carrying out systematic attacks against non-Arab villages in Darfur.

ETHNOGRAPHIC BACKGROUND

Darfur covers about one-fifth of Sudan's vast territory and is home to one-seventh of its population. It includes a mixture of Arab and non-Arab ethnic groups, both of which are predominantly Muslim. The Fur ethnic group (Darfur means "homeland of the Fur") is the largest non-Arab ethnic group in the region. Northern Darfur State is home to the nomadic non-Arab Zaghawa but also includes a significant number of Arabs, such as the Meidab. Sedentary non-Arabs from the Fur, Masalit, Daju, and other ethnic groups live in Western Darfur State. The arid climate and the competition for scarce resources over the years have contributed to recurring conflict between nomadic Arab herders and non-Arab farmers, particularly over land and grazing rights. Various ethnic groups have fought over access to water, grazing rights, and prized agricultural land as desertification has driven herders farther south.

POLITICAL AND MILITARY CONFLICT

Ethnic violence affected the Darfur region in the 1980s. In 1986, Prime Minister Sadiq al-Mahdi armed the ethnic-Arab tribes to fight John Garang's Sudanese People's Liberation Army (SPLA). After helping the GoS beat back an SPLA attack in Darfur in 1991, one of these Arab tribes sought to resolve ancient disputes over land and water rights by attacking the Zaghawa, Fur, and Massalit peoples. Arab groups launched a campaign in Southern Darfur State that resulted in the destruction of some 600 non-Arab villages and the deaths of about 3,000 people. The GoS itself encouraged the formation of an "Arab Alliance" in Darfur to keep non-Arab ethnic groups in check. Weapons flowed into Darfur and the conflict spread. After President Bashir seized power in 1989, the new government disarmed non-Arab ethnic groups but allowed politically loyal Arab allies to keep their weapons.

In February 2003, rebels calling themselves the Darfur Liberation Front (DLF) attacked GoS military installations and the provincial capital of Al Fashir. The DLF complained of economic marginalization and demanded a power sharing arrangement with the GoS. In March 2003, the DLF changed its name to the Sudan Liberation Movement/Army (SLM/A), intensified its military operations, unveiled a political program for a "united democratic Sudan," and bolstered its strength to some 4,000 rebels. The Justice and Equality Movement, with fewer than 1,000 rebels, was established in 2002 but has since joined the SLM/A in several campaigns against GoS forces.

The GoS has provided support to Arab militiamen attacking non-Arab civilians, according to press and NGO reports. Refugee accounts corroborated by U.S. and other independent reporting suggest that Khartoum has continued to provide direct support for advancing Janjaweed. Aerial bombardment and attacks on civilians reportedly have occurred widely throughout the region; respondents named more than one hundred locations that experienced such bombardment [see map, p. 167]. The extent to which insurgent base camps were co-located with villages and civilians is unknown. The number of casualties caused by aerial bombardment cannot be determined, but large numbers of Darfurians have been forced to flee their villages. According to press and NGO reports, the GoS has given Janjaweed recruits salaries, communication equipment, arms, and identity cards.

CURRENT INTERNATIONAL RESPONSE

On July 30, 2004, the UN Security Council adopted Resolution 1556, which demanded that the GoS fulfill commitments it made to disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates; it also called on the GoS to allow humanitarian access to Darfur, among other things. The United Nations placed an embargo on the sale or supply of materiel and training to nongovernmental entities and individuals in Darfur. The resolution endorsed the African Union (AU) deployment of monitors and a protection force to Darfur. It requested the UN Secretary-General to report on GoS progress in thirty days and held out the possibility of further actions, including sanctions, against the GoS in the event of non-compliance.

The Security Council has expressed its deep concern over reports of large-scale violations of human rights and international humanitarian law in Darfur. The main protection concerns identified by the United Nations and corroborated by the ADT include threats to life and freedom of movement, forced relocation, forced return, sexual violence, and restricted access to humanitarian assistance, social services, sources of livelihood, and basic services. Food security has been precarious and will probably worsen as the rainy season continues. Many displaced households no longer can feed themselves because of the loss of livestock and the razing of food stores.

Relief agencies' access to areas outside the state capitals of Al Junaynah, Al Fashir, and Nyala was limited until late May. Visits by UN Secretary-General Kofi Annan and Secretary of State Colin Powell in June 2004 brought heightened attention to the growing humanitarian crisis. As a

result, the GoS lifted travel restrictions and announced measures to facilitate humanitarian access. Nonetheless, serious problems remain, specifically capacity, logistics, and security for relief efforts. USAID's Disaster Assistance Response Team and other agencies have deployed additional staff to increase emergency response capacity.

REFUGEE INTERVIEWS AND SURVEY RESULTS

The Atrocities Documentation Team (ADT) conducted a random-sample survey of Darfurian refugees in eastern Chad in July and August 2004. The team interviewed eleven hundred thirty-six refugees, many of whom had endured harsh journeys across the desolate Chad-Sudan border.

A plurality of the respondents were ethnic Zaghawa (46 percent), with smaller numbers belonging to the Fur (8 percent) and Massalit (30 percent) ethnic groups. Slightly more than half the respondents (56 percent) were women. [See map, p. 173]

Analysis of the refugee interviews points to a pattern of abuse against members of Darfur's non-Arab communities, including murder, rape, beatings, ethnic humiliation, and destruction of property and basic necessities. Many of the reports detailing attacks on villages refer to government and militia forces, preceded by aerial bombardment, acting together to commit atrocities. Respondents said government and militia forces wore khaki or brown military uniforms. Roughly one-half of the respondents noted GOS forces had joined Jingaweit irregulars in attacking their villages. Approximately one-quarter of the respondents noted GoS forces had acted alone; another 14 percent said the Janjaweed had acted alone. Two-thirds of the respondents reported aerial bombings against their villages; four-fifths said they had witnessed the complete destruction of their villages. Sixty-one percent reported witnessing the killing of a family member. About one-third of the respondents reported hearing racial epithets while under attack; one-quarter witnessed beatings. Large numbers reported the looting of personal property (47 percent) and the theft of livestock (80 percent).

Most reports followed a similar pattern:

1. GoS aircraft or helicopters bomb villages.
2. GoS soldiers arrive in trucks, followed closely by Janjaweed militia riding horses or camels.
3. GoS soldiers and militia surround and then enter villages, under cover of gunfire.
4. Fleeing villagers are targets in aerial bombing.

5. The Janjaweed and GoS soldiers loot the village after most citizens have fled, often using trucks to remove belongings.
6. Villages often experience multiple attacks over a prolonged period before they are destroyed by burning or bombing.

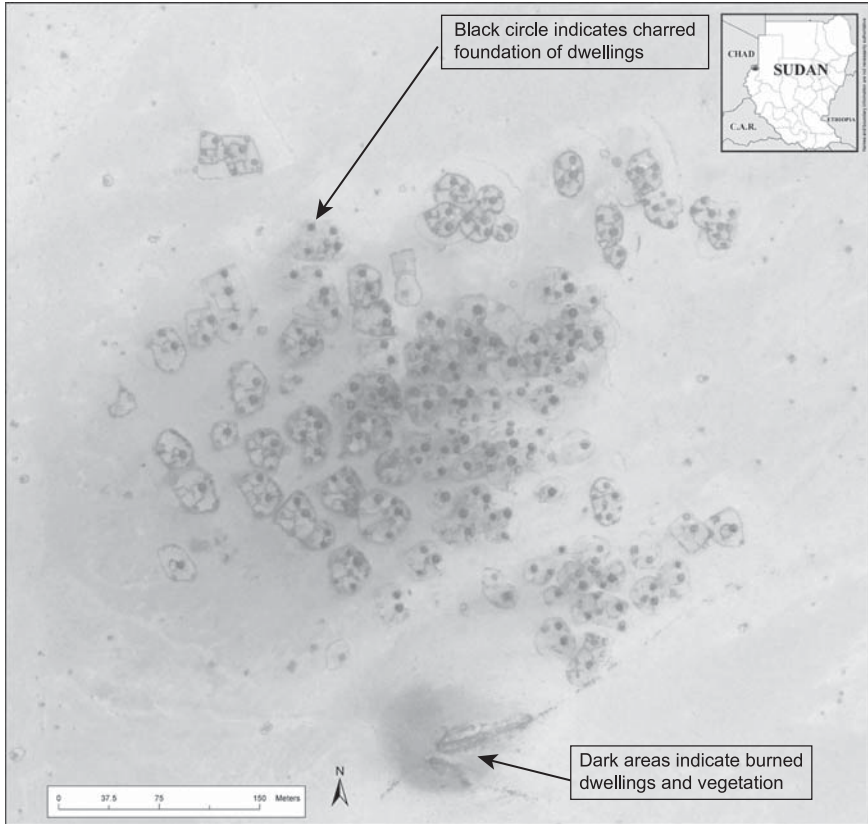
When describing attacks, refugees often referred to GoS soldiers and Janjaweed militias as a unified group. As one refugee stated, "The soldiers and Janjaweed, always they are together." The primary victims have been non-Arab residents of Darfur. Numerous credible reports corroborate the use of racial and ethnic epithets by both the Janjaweed and GoS military personnel; "Kill the slaves; Kill the slaves!" and "We have orders to kill all the blacks" are common. One refugee reported a militia member stating, "We kill all blacks and even kill our cattle when they have black calves." Numerous refugee accounts point to mass abductions, including persons driven away in GoS vehicles, but respondents usually do not know the abductees' fate. A few respondents indicated personal knowledge of mass executions and gravesites.

A subset of four hundred respondents were asked about rebel activity in or near their villages. Nearly nine in ten said there was no rebel activity before the attack. Nine percent noted rebels were in the vicinity; 2 percent said the rebels were present in their villages. The overwhelming majority (91 percent) said their village was not defended at all against the attack. One percent asserted their village had been successfully defended and another 8 percent cited an unsuccessful defense. [See map, p. 167]

Respondents reported ethnic tensions in the region had risen over the past few years. For example, markets in which non-Arabs and Arabs had previously interacted have become segregated, and almost all villages are now said to be ethnically homogenous. According to many of the interviewees, GoS soldiers and Janjaweed attacked villages because of their non-Arab populations; men of fighting age have been abducted, executed, or both; and women and girls have been abducted and raped.

REFUGEE INTERVIEWS AND SURVEY METHODOLOGY

This report is based on results from personal interviews conducted by three teams between July 12 and August 18, 2004. DRL, USAID, and the Coalition for International Justice jointly designed the questionnaire in conjunction with other NGOs. INR provided technical assistance on questionnaire design and survey methodology. The teams used a semi-structured interviewing approach that permitted the refugees to give the broadest possible accounts of the events they had experienced. The interviews were



Example of a destroyed village in Darfur (with permission, DigitalGlobe Inc. USG Clearview License, 2004).

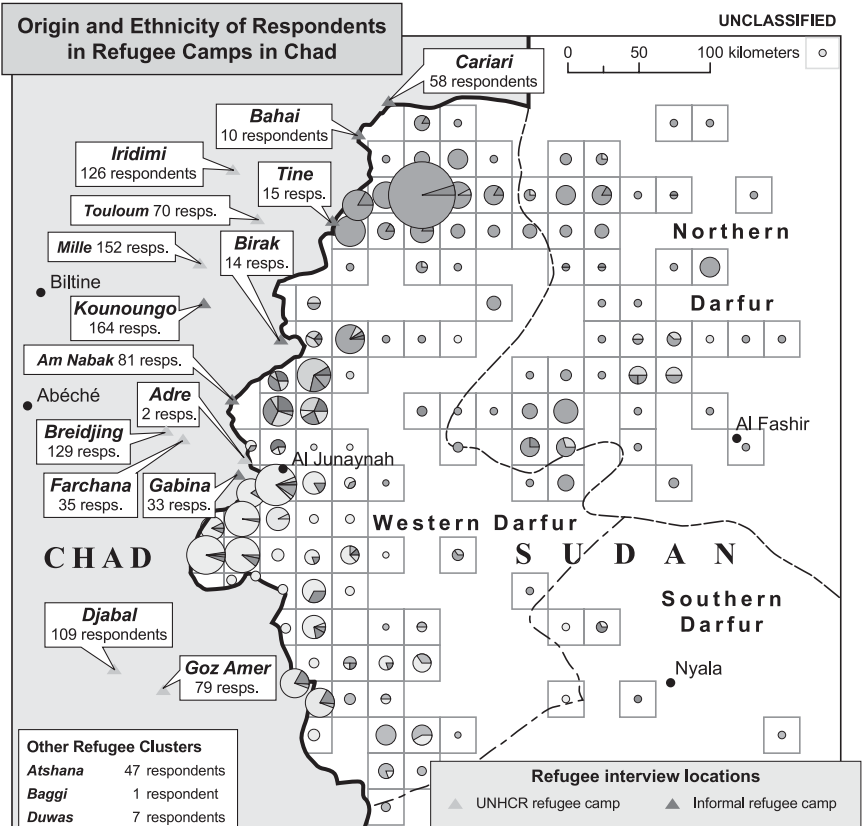
conducted in nineteen locations in eastern Chad, including UNHCR camps and informal settlements.

Refugees were selected using a systematic, random sampling approach designed to meet the conditions in Chad. Interviewers randomly selected a sector within a refugee camp and then, from a fixed point within the sector, chose every tenth dwelling unit for interviewing. All adults were listed within the dwelling unit, and one adult was randomly selected. This methodology ensures the results are as representative as possible in light of refugee conditions. Interviews took place in private, with only the refugee, a translator, and the interviewer present.

Several characteristics of the survey must be underscored. First, accounts of atrocities may be dated, depending on when the individual refugee fled his or her village. Second, the data may actually undercount the extent

of atrocities because mass attacks often leave few survivors. Third, most respondents come from villages within fifty miles of the border in Western Darfur and Northern Darfur States. Fourth, it is very likely that rapes are underreported because of the social stigma attached to acknowledging such violations of female members of one's family.

The results are broadly representative of Darfurian refugees in Chad but may not be representative of internally displaced persons still in Darfur because they were not included in the sample. A margin of error for this sample cannot be calculated because of the lack of accurate demographic information about the refugee camps and settlements. The methodology was designed to achieve as broadly representative a sample as was feasible under the prevailing conditions. Dates of events reported by refugees frequently utilized the Islamic calendar; these dates were then converted to dates on the Gregorian calendar.



The field data for the eleven hundred thirty-six interviews were compiled using a standardized data entry process that involved the collection and coding of detailed information from each refugee respondent's set of answers. The researchers then used a statistical program to aggregate the data and analyze the results.

DOCUMENT 3

Following his analysis of the data collected by the US State Department-sponsored Atrocities Documentation Project (ADP), U.S. Secretary State of Colin Powell concluded that Sudan had, in fact, committed genocide against the black Africans of Sudan. On September 9, 2004, Powell appeared before the U.S. Senate Foreign Relations Committee in order to inform Committee members of his conclusion. In his report, Powell comments on the ADP investigation, the data collected, and the rationale for his conclusion. Powell's most striking statement was as follows: "Based on a consistent and widespread pattern of atrocities (killings, rape, the burning of village) committed by the Janjaweed and [Sudanese] government forces against non-Arab villagers, we have concluded—I have concluded—that genocide has been committed in Darfur and that the Government of Sudan and the Janjaweed bear responsibility—and genocide may still be occurring."

Under Chapter VI of the UN Charter, the United States referred the matter of the Darfur crisis to the United Nations. This was a totally legitimate action, but many human rights activists, genocide scholars, and anti-genocide activists were sorely disappointed that the United States did not act more valiantly following its finding. At one and the same time, the actions of the U.S. made sense to many in that they understood the U.S. could not legally carry out an intervention without the imprimatur of the UN Security Council and, furthermore, appreciated the fact that since the U.S. was already engaged in wars in Iraq and Afghanistan, two Muslim states, its military was stretched thin, and not a few worldwide would have looked askance at the United States engaging in war with yet another Muslim state.

This document is noteworthy for two primary reasons. First, U.S. Secretary of State Powell's declaration was the first time that one government formally accused another government of ongoing genocide. Second, Secretary Powell, in his public testimony invoked for the first time ever (by any government) Chapter VIII of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNCG), calling on the Security Council to take action "appropriate for the prevention and suppression of acts of genocide."

*(For a detailed discussion of the genesis, implementation and findings of the ADP, see Samuel Totten's and Eric Markusen's *Genocide in Darfur: Investigating Atrocities in the Sudan*. New York: Routledge, 2006. For a detailed statistical analysis of the findings of the ADP, see John Hagan's and Weona Rymond-Richmond's *Darfur and the Crime of Genocide* New York: Cambridge University Press, 2009.)*

**THE CRISIS IN DARFUR, SECRETARY OF STATE COLIN
L. POWELL, WRITTEN REMARKS, SENATE FOREIGN
RELATIONS COMMITTEE, SEPTEMBER 9, 2004**

Mr. Chairman, members of the committee, thank you for the opportunity to testify on the situation in Darfur. Let me start by reviewing a little history.

The violence in Darfur has complex roots in traditional conflicts between Arab nomadic herders and African farmers. The violence intensified during 2003 when two groups—the Sudan Liberation Movement and the Justice and Equality Movement—declared open rebellion against the Government of Sudan because they feared being on the outside of the power and wealth-sharing agreements in the north-south negotiations. Khartoum reacted aggressively, intensifying support for Arab militias, the so-called jinjaweid. The Government of Sudan supported the jinjaweid, directly and indirectly, as they carried out a scorched-earth policy towards the rebels and the African civilian population.

Mr. Chairman, the United States exerted strong leadership to focus international attention on this unfolding tragedy. We first took the issue of Sudan to the United Nations (UN) Security Council last fall. President Bush was the first head of state to condemn publicly the Government of Sudan and to urge the international community to intensify efforts to end the violence. In April of this year, the United States brokered a ceasefire between the Government of Sudan and the rebels, and then took the lead to get the African Union (AU) to monitor that ceasefire.

As some of you are aware, I traveled to the Sudan in midsummer and made a point of visiting Darfur. It was about the same time that Congressman Wolf and Senator Brownback were there, as well as Secretary General Kofi Annan. In fact, the Secretary General and I were able to meet and exchange notes. We made sure that our message to the Sudanese government was consistent. Senator Brownback can back me up when I say that all of us saw the suffering that the people of Darfur are having to endure. And Senator Corzine was just in Darfur and can vouch for the fact that atrocities are still occurring. All of us met with people who had been driven from their homes—indeed many having seen their homes and all their worldly possessions destroyed or confiscated before their eyes—by the terrible violence that is occurring in Darfur.

During my visit, humanitarian workers from my own Agency—USAID—and from other Non-Governmental Organizations (NGOs) told me how

they are struggling to bring food, shelter, and medicines to those so desperately in need—a population of well over one million.

In my midsummer meetings with the Government of Sudan, we presented them with the stark facts of what we knew about what is happening in Darfur from the destruction of villages, to the raping and the killing, to the obstacles that impeded relief efforts. Secretary General Annan and I obtained from the Government of Sudan what they said would be firm commitments to take steps, and to take steps immediately, that would remove these obstacles, help bring the violence to an end, and do it in a way that we could monitor their performance.

There have been some positive developments since my visit, and since the visit of Senator Brownback, Congressman Wolf, and the Secretary General.

The Sudanese have met some of our benchmarks such as engaging in political talks with the rebels and supporting the deployment of observers and troops from the AU to monitor the ceasefire between Khartoum and the rebels. Some improvements in humanitarian access have also occurred though the government continues to throw obstacles in the way of the fullest provision of assistance.

The AU Ceasefire Commission has also been set up and is working to monitor more effectively what is actually happening in Darfur. The general, who is in charge of that mission, a Nigerian general by the name of Okonkwo, is somebody that we know well. He is the same Nigerian general who went into Liberia last year and helped stabilize the situation there.

The AU's mission will help to restore sufficient security so that these displaced, starving, hounded people can at least avail themselves of the humanitarian assistance that is available. But what is really needed is enough security so that they can go home. And what is really needed is for the jinjaweid militias to cease and desist their murderous raids against these people—and for the Government in Khartoum to stop being complicit in such raids. Khartoum has made no meaningful progress in substantially improving the overall security environment by disarming the jinjaweid militias or arresting its leaders.

So we are continuing to press that Government and we continue to monitor them. We continue to make sure that we are not just left with promises instead of actual action and performance on the ground. Because it is absolutely clear that as we approach the end of the rainy season, the situation on

the ground must change, and it must change quickly. There are too many tens upon tens of thousands of human beings who are at risk. Some of them have already been consigned to death because of the circumstances they are living in now. They will not make it through the end of the year. Poor security, inadequate capacity, and heavy rains (which will not diminish until late September) continue to hamper the relief effort.

The UN estimates there are 1,227,000 Internally Displaced Persons (IDPs) in Darfur. In July, almost 950,000 IDPs received some form of food assistance. About 200,000 Sudanese refugees are being assisted by UNHCR and partner organizations in Chad. The World Food Program (WFP) expects two million IDPs will need food aid by October.

U.S. Government provision of aid to the Darfur crisis in Sudan and Chad totaled \$211.3 million as of September 2, 2004. This includes \$112.9 million in food assistance, \$50.2 million in non-food assistance, and \$36.4 million for refugees in Chad, \$5 million for refugee programs in Darfur, and \$6.8 million for the African Union mission.

The U.S. also strongly supports the work of the AU monitoring mission in Darfur. In fact, we initiated the Mission through base camp set-up and logistics support by a private contractor. The Mission is staffed with 125 AU monitors now deployed in the field and has completed approximately 20 investigations of cease-fire violations. The AU monitoring staff is supported by a protection force of 305, made up of a Rwandan contingent of 155 (they arrived on August 15) and a Nigerian contingent of 150 (they arrived on August 30). Recognizing the security problems in Darfur, the UN and the U.S. have begun calling for an expanded AU mission in Darfur through the provision of additional observers and protection forces. Khartoum appears to have signaled a willingness to consider an expanded mission.

I am pleased to announce, Mr. Chairman, that the State Department has identified \$20.5 million in FY04 funds for initial support of this expanded mission. We look forward to consulting with the Congress on meeting additional needs.

As you know, as we watched through the month of July, we felt more pressure was required. So we went to the UN and asked for a resolution. We got it on July 30.

Resolution 1556 demands that the Government of Sudan take action to disarm the jinjaweid militia and bring jinjaweid leaders to justice. It

warns Khartoum that the Security Council will take further actions and measures—UN-speak for sanctions—if Sudan fails to comply. It urges the warring parties to conclude a political agreement without delay and it commits all states to target sanctions against the jinjaweid militias and those who aid and abet them as well as others who may share responsibility for this tragic situation. Too many lives have already been lost. We cannot lose any more time. We in the international community must intensify our efforts to help those imperiled by violence, starvation and disease in Darfur.

But the Government of Sudan bears the greatest responsibility to face up to this catastrophe, rein in those who are committing these atrocities, and save the lives of its own citizens. At the same time, however, the rebels have not fully respected the ceasefire. We are disturbed at reports of rebel kidnappings of relief workers. We have emphasized to the rebels that they must allow unrestricted access of humanitarian relief workers and supplies and cooperate fully, including with the AU monitoring mission.

We are pleased that the Government of Sudan and the rebels are currently engaged in talks in Abuja, hosted by the AU. These talks are aimed at bringing about a political settlement in Darfur. The two sides have agreed on a protocol to facilitate delivery of much-needed humanitarian assistance to rebel-held areas, and are now engaged in discussions of a protocol on security issues. We are urging both sides to intensify negotiations in order to reach a political settlement.

At midsummer, I told President Bashir, Vice President Taha, Foreign Minister Ismail, the Minister of Interior and others, that the United States wants to see a united, prosperous, democratic Sudan. I told them that to that end we are fully prepared to work with them. I reminded them that we had reached an historic agreement on June 5—an agreement between the Government of Sudan and the Sudan People's Liberation Movement (SPLM). That agreement covered all the outstanding issues in the north-south process. Since then, the parties have been engaged in final negotiations on remaining details. However, the parties are stuck on the specifics of a formal ceasefire agreement and have not yet begun the final round of implementation modalities. Special Envoy Sumbeiywo met recently with the parties, but could not resolve the remaining ceasefire-related issues. Khartoum appears unwilling to resume talks at the most senior level, claiming it must focus on Darfur. That would be fine if its focus were the right focus. But it is not. The SPLM is more forward leaning, but still focused on negotiating details. We believe that a comprehensive agreement would bolster efforts to resolve the crisis in Darfur by providing a

legal basis for a political solution (decentralization) and by opening up the political process in Khartoum.

President Bashir has repeatedly pledged to work for peace, and he pledged that again when we met in midsummer. But President Bush, this Congress, Secretary General Annan and the international community want more than promises. We want to see dramatic improvements on the ground right now. Indeed, we wanted to see them yesterday.

In the meantime, we are doing all that we can. We are working with the international community to make sure that all of those nations who have made pledges of financial assistance meet those pledges. In fact, the estimated needs have grown and the donor community needs to dig deeper. America has been in the forefront of providing assistance to the suffering people of Darfur and will remain in the forefront. But it is time for the entire international community to increase their assistance. The U.S. has pledged \$299 million in humanitarian aid through FY05, and \$11.8 million to the AU mission, and we are well on the way to exceeding these pledges.

SYG Annan's August 30 report called for an expanded AU mission in Darfur to monitor commitments of the parties more effectively, thereby enhancing security and facilitating the delivery of humanitarian assistance. The report also highlighted Khartoum's failure to rein in and disarm the jinjaweid militia, and noted that the Sudanese military continued to take part in attacks on civilians, including aerial bombardment and helicopter strikes.

We have begun consultation in New York on a new resolution that calls for Khartoum to cooperate fully with an expanded AU force and for cessation of Sudanese military flights over the Darfur region. It also provides for international overflights to monitor the situation in Darfur and requires the Security Council to review the record of Khartoum's compliance to determine if sanctions, including on the Sudanese petroleum sector, should be imposed. The resolution also urges the Government of Sudan and the SPLM to conclude negotiations on a comprehensive peace accord.

And finally there is the matter of whether or not what is happening in Darfur is genocide. Since the U.S. became aware of atrocities occurring in Sudan, we have been reviewing the Genocide Convention and the obligations it places on the Government of Sudan.

In July, we launched a limited investigation by sending a team to refugee camps in Chad. They worked closely with the American Bar Association and the Coalition for International Justice and were able to interview 1,136

of the 2.2 million people the UN estimates have been affected by this horrible violence. Those interviews indicated:

- A consistent and widespread pattern of atrocities (killings, rapes, burning of villages) committed by jinjaweid and government forces against non-Arab villagers;
- Three-fourths (74%) of those interviewed reported that the Sudanese military forces were involved in the attacks;
- Villages often experienced multiple attacks over a prolonged period before they were destroyed by burning, shelling or bombing, making it impossible for villagers to return.

When we reviewed the evidence compiled by our team, along with other information available to the State Department, we concluded that genocide has been committed in Darfur and that the Government of Sudan and the jinjaweid bear responsibility—and genocide may still be occurring. Mr. Chairman, we are making copies of the evidence our team compiled available to this committee today.

We believe in order to confirm the true nature, scope and totality of the crimes our evidence reveals, a full-blown and unfettered investigation needs to occur. Sudan is a contracting party to the Genocide Convention and is obliged under the Convention to prevent and to punish acts of genocide. To us, at this time, it appears that Sudan has failed to do so.

Article VIII of the Genocide Convention provides that Contracting Parties “may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.”

Today, the U.S. is calling on the UN to initiate a full investigation. To this end, the U.S. will propose that the next UN Security Council Resolution on Sudan request a UN investigation into all violations of international humanitarian law and human rights law that have occurred in Darfur, with a view to ensuring accountability.

Mr. Chairman, as I said the evidence leads us to the conclusion that genocide has occurred and may still be occurring in Darfur. We believe the evidence corroborates the specific intent of the perpetrators to destroy “a group in whole or in part.” This intent may be inferred from their deliberate conduct. We believe other elements of the convention have been met as well.

Under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which both the United States and Sudan are parties, genocide occurs when the following three criteria are met:

- specified acts are committed:
 - a. killing;
 - b. causing serious bodily or mental harm;
 - c. deliberately inflicting conditions of life calculated to bring about physical destruction of a group in whole or in part;
 - d. imposing measures to prevent births; or
 - e. forcibly transferring children to another group;
- these acts are committed against members of a national, ethnic, racial or religious group; and
- they are committed “with intent to destroy, in whole or in part, [the group] as such.”

The totality of the evidence from the interviews we conducted in July and August, and from the other sources available to us, shows that:

- The jinjaweid and Sudanese military forces have committed large-scale acts of violence, including murders, rape and physical assaults on non-Arab individuals;
- The jinjaweid and Sudanese military forces destroyed villages, foodstuffs, and other means of survival;
- The Sudan Government and its military forces obstructed food, water, medicine, and other humanitarian aid from reaching affected populations, thereby leading to further deaths and suffering; and
- Despite having been put on notice multiple times, Khartoum has failed to stop the violence.

Mr. Chairman, some seem to have been waiting for this determination of genocide to take action. In fact, however, no new action is dictated by this determination. We have been doing everything we can to get the Sudanese government to act responsibly. So let us not be preoccupied with this designation of genocide. These people are in desperate need and we must help them. Call it a civil war. Call it ethnic cleansing. Call it genocide. Call it “none of the above.” The reality is the same: there are people in Darfur who desperately need our help.

I expect that the government in Khartoum will reject our conclusion of genocide anyway. Moreover, at this point genocide is our judgment and not the judgment of the International Community. Before the Government of Sudan is taken to the bar of international justice, let me point out that

there is a simple way for Khartoum to avoid such wholesale condemnation. That way is to take action.

The government in Khartoum should end the attacks, ensure its people—all of its people—are secure, hold to account those who are responsible for past atrocities, and ensure that current negotiations are successfully concluded. That is the only way to peace and prosperity for this war-ravaged land.

Specifically, Mr. Chairman, the most practical contribution we can make to the security of Darfur in the short-term is to increase the number of African Union monitors. That will require the cooperation of the Government of Sudan.

In the intermediate and long term, the security of Darfur can be best advanced by a political settlement at Abuja and by the successful conclusion of the peace negotiations between the SPLM and the Government of Sudan.

DOCUMENT 4

Following the United States Government's referral of the Darfur crisis, along with the findings of its Atrocities Documentation Project (ADP), to the United Nations, the UN conducted its own investigation into the situation in Darfur. The UN Commission of Inquiry on Darfur (COI) conducted its investigation in November and December of 2004 and January of 2005. The COI conducted its investigation in Sudan (Darfur and Khartoum), Chad, Eritrea, and Addis Ababa, interviewing key actors in each location. Ultimately, the COI concluded that the atrocities perpetrated by Government of Sudan troops and the Janjaweed rose to level of crimes against humanity and war crimes, but not genocide. While the COI's investigation, analysis and findings received kudos from some, they were castigated by others. Those who praised the COI found its investigation to be thorough, its analysis detailed and logical, and its findings logical and sensible. Those who looked askance at the COI found the investigation sloppy, its analysis illogical, and its ultimate finding both politically charged and illogical.

On March 31, 2005, the UN Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593 in referring the situation in Darfur, Sudan to the Prosecutor of the International Criminal Court. (For various discussions of the strengths and weaknesses of the UNCOI, see: Eric Reeves (2005) "Report on the UN International Commission of Inquiry on Darfur: A Critical Analysis. Part I." See: <http://www.sudanreeves.org/Sections-article489-p1.html>; see Eric Reeves (2006) "Report of the UN International Commission of Inquiry on Darfur: A Critical Analysis. Part II." See at: <http://www.sudanreeves.org/Sections-article488-p1.html>; William A. Schabas (2005) "Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide" *Leiden Journal of International Law*, 18(4):871-885; Eric Markusen and Samuel Totten (2005) "Investigating Allegations of Genocide in Darfur: The U.S. Atrocities Documentation Team, and the UN Commission of Inquiry" in Joyce Apsel (Ed.) *Darfur: Genocide Before Our Eyes*. New York: Institute for the Study of Genocide, pp. 48-59; Noelle Quenivet (2006) "The Report of the International Commission of Inquiry on Darfur: The Question of Genocide." *Human Rights Review*, 7(4):38-68; and Samuel Totten (2009) "The UN International Commission of Inquiry on Darfur: New and Disturbing Findings." *Genocide Studies and Prevention*, December, 4(3): 354-378.)

**REPORT OF THE INTERNATIONAL COMMISSION
OF INQUIRY ON DARFUR TO THE UNITED NATIONS
SECRETARY-GENERAL, JANUARY 25, 2005**

EXECUTIVE SUMMARY

Acting under Chapter VII of the United Nations Charter, on 18 September 2004 the Security Council adopted resolution 1564 requesting, *inter alia*, that the Secretary-General ‘rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable’.

In October 2004, the Secretary General appointed Antonio Cassese (Chairperson), Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott as members of the Commission and requested that they report back on their findings within three months. The Commission was supported in its work by a Secretariat headed by an Executive Director, Ms. Mona Rishmawi, as well as a legal research team and an investigative team composed of investigators, forensic experts, military analysts, and investigators specializing in gender violence, all appointed by the Office of the United Nations High Commissioner for Human Rights. The Commission assembled in Geneva and began its work on 25 October 2004.

In order to discharge its mandate, the Commission endeavoured to fulfil four key tasks: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and (4) to suggest means of ensuring that those responsible for such violations are held accountable. While the Commission considered all events relevant to the current conflict in Darfur, it focused in particular on incidents that occurred between February 2003 and mid-January 2005.

The Commission engaged in a regular dialogue with the Government of the Sudan throughout its mandate, in particular through meetings in Geneva and in the Sudan, as well as through the work of its investigative team. The Commission visited the Sudan from 7–21 November 2004 and 9–16 January 2005, including travel to the three Darfur States. The investigative team remained in Darfur from November 2004 through January

2005. During its presence in the Sudan, the Commission held extensive meetings with representatives of the Government, the Governors of the Darfur States and other senior officials in the capital and at provincial and local levels, members of the armed forces and police, leaders of rebel forces, tribal leaders, internally displaced persons, victims and witnesses of violations, NGOs and United Nations representatives.

The Commission submitted a full report on its findings to the Secretary-General on 25 January 2005. The report describes the terms of reference, methodology, approach and activities of the Commission and its investigative team. It also provides an overview of the historical and social background to the conflict in Darfur. The report then addresses in detail the four key tasks referred to above, namely the Commission's findings in relation to: i) violations of international human rights and humanitarian law by all parties; ii) whether or not acts of genocide have taken place; iii) the identification of perpetrators; and iv) accountability mechanisms. These four sections are briefly summarized below.

I. Violations of international human rights law and international humanitarian law

In accordance with its mandate to 'investigate reports of violations of human rights law and international humanitarian law', the Commission carefully examined reports from different sources including Governments, inter-governmental organizations, United Nations bodies and mechanisms, as well as non-governmental organizations.

The Commission took as the starting point for its work two irrefutable facts regarding the situation in Darfur. Firstly, according to United Nations estimates there are 1.65 million internally displaced persons in Darfur, and more than 200,000 refugees from Darfur in neighbouring Chad. Secondly, there has been large-scale destruction of villages throughout the three states of Darfur. The Commission conducted independent investigations to establish additional facts and gathered extensive information on multiple incidents of violations affecting villages, towns and other locations across North, South and West Darfur. The conclusions of the Commission are based on the evaluation of the facts gathered or verified through its investigations.

Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government

forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held *incommunicado* for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called 'African' tribes.

In their discussions with the Commission, Government of the Sudan officials stated that any attacks carried out by Government armed forces in Darfur were for counter-insurgency purposes and were conducted on the basis of military imperatives. However, it is clear from the Commission's findings that most attacks were deliberately and indiscriminately directed against civilians. Moreover even if rebels, or persons supporting rebels, were present in some of the villages—which the Commission considers likely in only a very small number of instances—the attackers did not take precautions to enable civilians to leave the villages or otherwise be shielded from attack. Even where rebels may have been present in villages, the impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels.

The Commission is particularly alarmed that attacks on villages, killing of civilians, rape, pillaging and forced displacement have continued during the course of the Commission's mandate. The Commission considers that action must be taken urgently to end these violations.

While the Commission did not find a systematic or a widespread pattern to these violations, it found credible evidence that rebel forces, namely members of the SLA and JEM, also are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage.

II. Have acts of genocide occurred?

The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by

Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

The Commission does recognise that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis.

The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.

III. Identification of perpetrators

The Commission has collected reliable and consistent elements which indicate the responsibility of some individuals for serious violations of international human rights law and international humanitarian law, including crimes against humanity or war crimes, in Darfur. In order to identify perpetrators, the Commission decided that there must be 'a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.' The Commission therefore makes an assessment of likely suspects, rather than a final judgment as to criminal guilt.

Those identified as possibly responsible for the above-mentioned violations consist of individual perpetrators, including officials of the Government of Sudan, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. Some

Government officials, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. Others are identified for their possible involvement in planning and/or ordering the commission of international crimes, or of aiding and abetting the perpetration of such crimes. The Commission also has identified a number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes, and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels.

The Commission has decided to withhold the names of these persons from the public domain. This decision is based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead will list the names in a sealed file that will be placed in the custody of the UN Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission's recommendations), who will use that material as he or she deems fit for his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor.

IV. Accountability mechanisms

The Commission strongly recommends that the Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the ICC Statute. As repeatedly stated by the Security Council, the situation constitutes a threat to international peace and security. Moreover, as the Commission has confirmed, serious violations of international human rights law and humanitarian law by all parties are continuing. The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region.

The alleged crimes that have been documented in Darfur meet the thresholds of the Rome Statute as defined in articles 7 (1), 8 (1) and 8 (f). There is an internal armed conflict in Darfur between the governmental

authorities and organized armed groups. A body of reliable information indicates that war crimes may have been committed on a large-scale, at times even as part of a plan or a policy. There is also a wealth of credible material which suggests that criminal acts were committed as part of widespread or systematic attacks directed against the civilian population, with knowledge of the attacks. In the opinion of the Commission therefore, these may amount to crimes against humanity.

The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive have undermined the effectiveness of the judiciary, and many of the laws in force in Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In any event, many have feared reprisals in the event that they resort to the national justice system.

The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur. Very few victims have lodged official complaints regarding crimes committed against them or their families, due to a lack of confidence in the justice system. Of the few cases where complaints have been made, most have not been properly pursued. Furthermore, procedural hurdles limit the victims' access to justice. Despite the magnitude of the crisis and its immense impact on civilians in Darfur, the Government informed the Commission of very few cases of individuals who have been prosecuted, or even disciplined, in the context of the current crisis.

The Commission considers that the Security Council must act not only against the perpetrators but also on behalf of the victims. It therefore recommends the establishment of a Compensation Commission designed to grant reparation to the victims of the crimes, whether or not the perpetrators of such crimes have been identified.

It further recommends a number of serious measures to be taken by the Government of the Sudan, in particular (i) ending the impunity for the war crimes and crimes against humanity committed in Darfur; (ii) strengthening the independence and impartiality of the judiciary, and empowering courts to address human rights violations; (iii) granting full and unimpeded

access by the International Committee of the Red Cross and United Nations human rights monitors to all those detained in relation to the situation in Darfur; (iv) ensuring the protection of all the victims and witnesses of human rights violations; (v) enhancing the capacity of the Sudanese judiciary through the training of judges, prosecutors and lawyers; (vi) respecting the rights of IDPs and fully implementing the Guiding Principles on Internal Displacement, particularly with regard to facilitating the voluntary return of IDPs in safety and dignity; (vii) fully cooperating with the relevant human rights bodies and mechanisms of the United Nations and the African Union; and (viii) creating, through a broad consultative process, a truth and reconciliation commission once peace is established in Darfur.

The Commission also recommends a number of measures to be taken by other bodies to help break the cycle of impunity. These include the exercise of universal jurisdiction by other States, re-establishment by the Commission on Human Rights of the mandate of the Special Rapporteur on human rights in Sudan, and public and periodic reports on the human rights situation in Darfur by the High Commissioner for Human Rights.

INTRODUCTION

I. The Role of The Commission of Inquiry

1. Establishment of the Commission

1. The International Commission of Inquiry on Darfur (henceforth the Commission) was established pursuant to United Nations Security Council resolution 1564 (2004), adopted on 18 September 2004. The resolution, passed under Chapter VII of the United Nations Charter, requested the Secretary-General rapidly to set up the Commission. In October 2004 the Secretary-General appointed a five member body (Mr. Antonio Cassese, from Italy; Mr. Mohammed Fayek, from Egypt; Ms Hina Jilani, from Pakistan; Mr. Dumisa Ntsebeza, from South Africa, and Ms Theresa Striggner-Scott, from Ghana), and designated Mr. Cassese as its Chairman. The Secretary-General decided that the Commission's staff should be provided by the Office of the High Commissioner for Human Rights. Ms Mona Rishmawi was appointed Executive Director of the Commission and head of its staff. The Commission assembled in Geneva and began its work on 25 October 2004. The Secretary-General requested the Commission to report to him within three months, i.e. by 25 January 2005.

2. Terms of reference

2. In § 12, resolution 1564 (2004) sets out the following tasks for the Commission: "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties"; "to determine also whether or not acts of genocide have occurred"; and "to identify the perpetrators of such

violations"; "with a view to ensuring that those responsible are held accountable." Under the resolution, these tasks must be discharged "immediately."

3. The first of the above tasks implies that the Commission, rather than investigating alleged violations, must investigate "reports" of such violations committed by "all parties." This means that it is mandated to establish facts relating to possible violations of international human rights and humanitarian law committed in Darfur. In this respect the Commission must act as a fact-finding body, beginning with an assessment of information contained in the various reports made by other bodies including Governments, United Nations bodies, organs of other intergovernmental organizations, as well as NGOs.
4. It also falls to the Commission to characterize, from the viewpoint of international criminal law, the violations of international human rights law and humanitarian law it may establish. This legal characterization is implicitly required by the further tasks of the Commission set out by the Security Council, namely (i) to establish whether those violations amount to genocide, and (ii) to identify the perpetrators. Clearly, the Commission may not be in a position to fulfil these tasks if it has not previously established (a) whether the violations amount to international crimes, and, if so, (b) under what categories of crimes they fall (war crimes, crimes against humanity, genocide, or other crimes). This classification is required not only for the purpose of determining whether those crimes amount to genocide, but also for the process of identifying the perpetrators. In order to name particular persons as suspected perpetrators, it is necessary to define the international crimes for which they might be held responsible.
5. The second task with which the Security Council entrusted the Commission is that of legally characterizing the reported violations with a view to ascertaining whether they amount to genocide.
6. The third task is that of "identifying the perpetrators of violations" "with a view to ensuring that those responsible are held accountable." This requires the Commission not only to identify the perpetrators, but also to suggest possible mechanisms for holding those perpetrators accountable. The Commission therefore must collect a reliable body of material that indicate which individuals may be responsible for violations committed in Darfur and who should therefore be brought to trial with a view to determining their liability. The Commission has not been endowed with the powers proper to a prosecutor (in particular, it may not subpoena witnesses, or order searches or seizures, nor may it request a judge to issue arrest warrants against suspects). It may rely only upon the obligation of the Government of the Sudan and the rebels to cooperate. Its powers are therefore limited by the manner in which the Government and the rebels fulfil this obligation.
7. In order to discharge its mandate in conformity with the international law that it is bound to apply, the Commission has to interpret the word "perpetrators" as covering the executioners or material authors of international crimes, as well as those who may have participated in the commission of such crimes under the notion of joint criminal enterprise, or ordered their perpetration, or aided or abetted the crimes, or in any other manner taken part in their perpetration. The

Commission has included in this inquiry those who may be held responsible for international crimes, under the notion of superior responsibility, because they failed to prevent or repress the commission of such crimes although they a) had (or should have had) knowledge of their commission, and b) wielded control over the persons who perpetrated them. This interpretation is justified by basic principles of international criminal law, which provide that individual criminal responsibility arises when a person materially commits a crime, as well as when he or she engages in other forms or modalities of criminal conduct.

8. Furthermore, the language of the Security Council resolution makes it clear that the request to “identify perpetrators” is “with a view to ensuring that those *responsible* are held accountable.” In § 7 the resolution reiterates its request to the Government of the Sudan “to end the climate of impunity in Darfur” and to bring to justice “*all those responsible, including* members of popular defence forces and Janjaweed militias” for violations of human rights law and international humanitarian law (emphasis added). Furthermore, the tasks of the Commission include that of “ensuring that *those responsible* are held accountable.” Thus, the Security Council has made it clear that it intends for the Commission to identify all those responsible for alleged international crimes in Darfur. This is corroborated by an analysis of the objective of the Security Council: if this body aimed at putting an end to atrocities, why should the Commission confine itself to the material perpetrators, given that those who bear the greatest responsibility normally are the persons who are in command, and who either plan or order crimes, or knowingly condone or acquiesce in their perpetration?
9. This interpretation is also in keeping with the wording of the same paragraph in other official languages (for instance, the French text speaks of “*auteurs de ces violations*” and the Spanish text of “*los autores de tales transgresiones*”). It is true that in many cases a superior may not be held to have taken part in the crimes of his or her subordinates, in which case he or she would not be regarded as a perpetrator or author of those crimes. In those instances where criminal actions by subordinates are isolated episodes, the superior may be responsible only for failing to “submit the matter to the competent authorities for investigation and prosecution.”¹ In such instances, unquestionably the superior may not be considered as the author of the crime perpetrated by his or her subordinates. However, when crimes are committed regularly and on a large scale, as part of a pattern of criminal conduct, the responsibility of the superior is more serious. By failing to stop the crimes and to punish the perpetrators, he or she in a way takes part in their commission.
10. The fourth task assigned to the Commission therefore is linked to the third and is aimed at ensuring that “those responsible are held accountable.” To this effect, the Commission intends to propose measures for ensuring that those responsible for international crimes in Darfur are brought to justice.

¹ According to the language of Article 28 (a) (ii) of the Statute of the International Criminal Court, which codifies customary international law.

11. As is clear from the relevant Security Council resolution, the Commission is mandated to consider only the situation in the Darfur region of the Sudan. With regard to the time-frame, the Commission's mandate is inferred by the resolution. While the Commission considered all events relevant to the current conflict in Darfur, it focused in particular on incidents that occurred between February 2003, when the magnitude, intensity and consistency of incidents noticeably increased, until mid-January 2005 just before the Commission was required to submit its report.

3. Working methods

12. As stated above, the Commission started its work in Geneva on 25 October 2004. It immediately discussed and agreed upon its terms of reference and methods of work. On 28 October 2004 it sent a Note Verbale to Member States and intergovernmental organizations, and on 2 November 2004 it sent a letter to non-governmental organizations, providing information about its mandate and seeking relevant information. It also posted information on its mandate, composition and contact details on the web-site of the Office of the High Commissioner for Human Rights (www.ohchr.org).
13. The Commission agreed at the outset that it would discharge its mission in strict confidentiality. In particular, it would limit its contacts with the media to providing factual information about its visits to the Sudan. The Commission also agreed that its working methods should be devised to suit each of its different tasks.
14. Thus, with regard to its first and second tasks, the Commission decided to examine existing reports on violations of international human rights and humanitarian law in Darfur, and to verify the veracity of these reports through its own findings, as well as to establish further facts. Although clearly it is not a judicial body, in classifying the facts according to international criminal law, the Commission adopted an approach proper to a judicial body. It therefore collected all material necessary for such a legal analysis.
15. The third task, that of "identifying perpetrators," posed the greatest challenge. The Commission discussed the question of the standard of proof that it would apply in its investigations. In view of the limitations inherent in its powers, the Commission decided that it could not comply with the standards normally adopted by criminal courts (proof of facts beyond a reasonable doubt)², or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a *prima facie* case)³. It concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a

²See for instance Rule 87 of the ICTY Rules of Procedure and Evidence and Article 66 (3) of the Statute of the International Criminal Court.

³Judge R. Sidhwa, of the ICTY, in his *Review of the Indictment against Ivica Rajić* (decision of 29 August 1995, case no. IT- 95-12) noted that under Rule 47(A) of the Tribunal's Rules of Procedure and Evidence (whereby the Prosecutor can issue an indictment whenever satisfied

person may reasonably be suspected of being involved in the commission of a crime.⁴ The Commission would obviously not make final judgments as to criminal guilt; rather, it would make an assessment of possible suspects⁵ that would pave the way for future investigations, and possible indictments, by a prosecutor.

16. The Commission also agreed that, for the purpose of “identifying the perpetrators,” it would interview witnesses, officials and other persons occupying positions of authority, as well as persons in police custody or detained in prison; examine documents; and visit places (in particular, villages or camps for IDPs, as well as mass grave sites) where reportedly crimes were perpetrated.
17. For the fulfilment of the fourth task the Commission deemed it necessary to make a preliminary assessment of the degree to which the Sudanese criminal justice system has been able and willing to prosecute and bring to trial alleged authors of international crimes perpetrated in Darfur, and then consider the various existing international mechanisms available. It is in the light of these evaluations that it has made recommendations on the most suitable measures.

“that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal”), a *prima facie* case existed when the prosecutor had in his possession sufficient evidence providing reasonable grounds to believe that the suspect had committed the crime within the jurisdiction of the Tribunal. According to the distinguished Judge, “reasonable grounds point to such facts and circumstances as would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime. To constitute reasonable grounds, facts must be such which are within the possession of the Prosecutor which raise a clear suspicion of the suspect being guilty of the crime. . . . It is sufficient that the Prosecutor has acted with caution, impartiality and diligence as a reasonably prudent prosecutor would under the circumstances to ascertain the truth of his suspicions. It is not necessary that he has double checked every possible piece of evidence, or investigated the crime personally, or instituted an enquiry into any special matter . . . The evidence . . . need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime. The expression “sufficient evidence” is thus not synonymous with “conclusive evidence” or “evidence beyond reasonable doubt.” (in ICTY, *Judicial Reports 1994–1995*, vol. II, The Hague-London-Boston, Kluwer, 1999, at 1065). According to Judge G. Kirk McDonald’s decision on the *Review of the Indictment against Dario Kordić and others* (10 November 1995, case no. IT–95-14), by *prima facie* case one refers to a credible case which would, if not contradicted by the defence, be a sufficient basis to convict the accused on the charge laid out against him (*ibidem*, p. 1123).

⁴This standard is even lower than that laid down in Rule 40 bis (B) (iii) of the ICTY Rules of Procedure and Evidence (a Rule providing that, if “a reliable and consistent body of material which tends to show that the suspect may have committed a crime” is available, an ICTY Judge may order the transfer and provisional detention of a suspect).

⁵See Rule 2 of the ICTY Rules of Procedure and Evidence, containing a definition of suspects (“Suspect: a person concerning whom the [ICTY] Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction”).

4. *Principal constraints under which the Commission has operated*

18. There is no denying that while the various tasks assigned to the Commission are complex and unique, the Commission was called upon to discharge them under difficult conditions. First of all, it operated under serious *time constraints*. As pointed out above, given that the Security Council had decided that the Commission must act urgently, the Secretary-General requested that the Commission report to him within three months of its establishment. The fulfilment of its complex tasks, in particular those concerning the finding of serious violations and the identification of perpetrators, required the Commission to work intensely and under heavy time pressure.
19. Furthermore, both its fact-finding mission and its task of identifying perpetrators would have benefited from the assistance of a great number of investigators, lawyers, military analysts and forensic experts. Given the scale and magnitude of incidents related to the conflict in Darfur, the establishment of facts and the collection of credible probative elements for the identification of suspected perpetrators are difficult tasks, which are not to be taken lightly. The Commission's budget did not allow for more than thirteen such experts. Having said this, the Commission nevertheless was able to gather a reliable and consistent body of material with respect to both the violations that occurred and the persons who might be suspected of bearing criminal responsibility for their perpetration. The Commission thus considers that it has been able to take a first step towards accountability.

5. *Brief account of the Commission's visits to the Sudan*

20. The Commission first visited the Sudan from 8 to 20 November 2004. It met with a number of high level officials including the First Vice-President, the Minister of Justice, the Minister for Foreign Affairs, the Minister of Interior, the Minister of Defence, the Minister of Federal Affairs, the Deputy Chief Justice, the Speaker of Parliament, the Deputy Head of the National Security and Intelligence Service, and members of the Rape Committees. It met with representatives of non-governmental organizations, political parties, and interested foreign government representatives in the Sudan. In addition, it held meetings with the United Nations Advance Mission in the Sudan (UNAMIS) and other United Nations representatives in the country. The Commission also visited Kober prison (See Annex 2 for a full list of meetings).
21. From 11 to 17 November 2004, the Commission visited Darfur. It divided itself into three teams, each focusing on one of the three states of Darfur. Each team met with the State Governor (*Wali*) and senior officials, visited camps of internally displaced persons, and spoke with witnesses and to the tribal leaders. In addition, the West Darfur team visited refugee camps in Chad and the South Darfur team visited the National Security Detention Center in Nyala.
22. The Commission's investigation team was led by a Chief Investigator and included four investigators, two female investigators specializing in gender violence, four forensic experts and two military analysts. Investigation team

members interviewed witnesses and officials in Khartoum and accompanied the Commissioners on their field mission to the three Darfur States. The investigation team was then divided into three sub-teams which were deployed to North, South and West Darfur.⁶

23. One Commission member and Commission staff, acting on behalf of the Commission visited Eritrea from 25–26 November 2004. They met with representatives of two rebel groups: The Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). They also met with former Sudanese officials who are now residing in Eritrea. Two members of the Commission, accompanied by two staff members, travelled to Addis Ababa from 30 November to 3 December 2004. The objectives were: to obtain a thorough assessment from the African Union (AU) on the situation in Darfur, the African Mission in the Sudan (AMIS) and the Inter-Sudanese talks in Abuja; and to discuss with the AU leadership ways and modalities for the Commission to strengthen its working cooperation. The delegation met with high level officials of the AU, including the newly appointed Special Representative for the Sudan. The delegation also had the opportunity to meet extensively with the Chair and some key members of the AU Integrated Task Force on Darfur.
24. A second visit to the Sudan took place between 9 and 16 January 2004. During this visit, the Commission focused on interviewing witnesses particularly in detention centres, and also met with some officials, members of civil society, and UN staff in Khartoum.
25. With the assistance of a team of five legal researchers and one political affairs officer, who were led by the Executive Director, the Commission analysed the information provided. It reviewed and analysed published, public reports on Darfur, other reports that were brought to the attention of the Commission in response to its requests for information, as well as other types of information. In order to manage the more than 20,000 pages of material it received, the Commission developed a database in which it recorded bibliographic and evidentiary details. The incidents' analysis carried out by the research team also was recorded in the database as a way to facilitate swift access by the Commissioners and staff to resource material and source information.

6. Cooperation of the Sudanese authorities and the rebels

26. Security Council resolution 1564 (2004) was adopted under Chapter VII of the United Nations Charter. The Security Council (SC) had previously determined (already in resolution 1556 [2004], at preambular § 21) that the situation in the Sudan constitutes a “threat to international peace and security and to stability in the region” under Article 39 of the United Nations Charter.
27. § 12 of the resolution, which requests the Secretary-General to establish an international commission of inquiry, also “*calls on* all parties to cooperate fully with such a commission.” The Commission considers that, by the very nature of the Commission and its mandate, both the Government of the Sudan and

⁶See Annex IV for a detailed overview of the activities of the investigative team.

the rebels are under a *bona fide obligation* to cooperate with it in the discharge of its various functions. In any event, both the Government of the Sudan and the rebel groups have willingly accepted to cooperate with the Commission.

(i.) *Criteria for appraising cooperation*

28. The Commission set forth the following criteria for evaluating the degree of cooperation of both the Government and the rebels: (i) freedom of movement throughout the territory of the Sudan; (ii) unhindered access to all places and establishments, and freedom to meet and interview representatives of governmental and local authorities, military authorities, community leaders, non-governmental organizations and other institutions, and any such person whose testimony is considered necessary for the fulfilment of its mandate; (iii) free access to all sources of information, including documentary material and physical evidence; (iv) appropriate security arrangements for the personnel and documents of the Commission; (v) protection of victims and witnesses and all those who appear before the Commission in connection with the inquiry and, in particular, guarantee that no such person would, as a result of such appearance, suffer harassment, threats, acts of intimidation, ill-treatment and reprisals; and (vi) privileges, immunities and facilities necessary for the independent conduct of the inquiry. A letter was sent to the Government outlining these criteria.

(ii.) *Cooperation of the Government*

29. As mentioned above, since its inception the Commission has engaged in a constant dialogue with the Government of the Sudan through meetings in Geneva and the Sudan, and through the work of its investigative team.
30. Generally speaking the attitude of the Government authorities towards the Commission has been cooperative. The authorities appointed an efficient liaison official in Khartoum, Dr Abdelmonem Osman Taha organized all the meetings with senior Government officials requested by the Commission. In addition, the Minister of Interior as the President's representative on Darfur appointed a Committee presided over by Major-General Magzoub and consisted of six senior officials from the Ministries of Defence and Interior, as well as the National Security and Intelligence Service. The Commission met the Committee and received relevant documents about the Government's views on the conflict in Darfur.
31. Moreover, in his report dated 3 December 2004 (S/2004/947), the Secretary-General referred to a meeting of the Joint Implementation Mechanism (JIM) held on 12 November 2004, during which the Minister of Justice provided the following assurances regarding the work of the Commission: a) the Government would accept the report of the Commission, whatever its findings; b) witnesses of incidents would not be subjected to maltreatment; and c) following strict instruction from the President, Omer Hassan Al-Bashir, no Sudanese officials would obstruct the Commission's investigations.

32. Furthermore, the Government did not impede the conduct of the Commission's work in the Sudan. In November 2004, a middle-level officer of the National Security Services refused to allow the Commission to have access to a number of persons being held in detention in Nyala (South Darfur). The Commission's Chairman requested the assistance of the liaison officer in Khartoum, and, subsequently, the Commission was able to interview the detainees without any hindrance. The Commission underwent a similar experience in Khartoum in January 2005, during its second visit to the Sudan. When some middle-level authorities refused to allow the Commission access to the National Security's Detention Centre in Khartoum, the Chairman requested the immediate intervention of higher authorities and the Commission was eventually allowed access to the Centre.
33. However, one issue must be raised regarding the minutes of the meetings of the Security Committees at the locality and State levels. In a meeting with the First Vice-President Ali Osman Mohammed Taha held in Khartoum on 10 November 2004, the Commission asked to review the records of the various Government agencies in Darfur concerning decisions relating to the use of armed forces against rebels and measures concerning the civilian population. The Commission promised to keep its scrutiny of such records strictly confidential. During the same meeting, First Vice-President Taha assured the Commission that it would be able to have access to and examine the minutes of the meetings of the Security Committees in the three States of Darfur and their various localities. However, when requested to produce those minutes, each of the Governors of the three States asserted that no such minutes existed and instead produced a selected list of final decisions on general issues. According to reliable sources, minutes and reports of such meetings are in fact produced by the Security Committees, and some of them relate to the operations conducted in Darfur to oppose the rebels or to deal with displaced persons. In spite of its requests, the Commission did not see copies of these documents.
34. An episode bearing on cooperation relates to another request by the Commission. In a meeting held on 9 November 2004 with Bakri Hassan Salih, Minister of Defence and other senior Ministry of Defence officials, the Commission requested access to records of the deployment of military aircraft and helicopter gunships in Darfur since February 2003. Again, the Commission undertook to treat such records confidentially. The Minister of Defence agreed to comply with the request and promised that the Commission would obtain the records in Darfur from the relevant authorities. When the Commission did not obtain copies of these records in Darfur, it reiterated its request in a meeting with the Committee on Darfur on 20 November 2004. The Chairman of the Committee promised to provide those records and subsequently provided the Commission with an incomplete file, promising that it would be supplemented with further information. After further requests by the Commission, a number of records related to the use of aircraft in Darfur between February 2003 and January 2005 were produced. However, a complete set of the records requests was never provided to the Commission.
35. The Commission also wishes to stress that there have been episodes indicative of pressure put by some regional or local authorities on prospective witnesses, or on witnesses already interviewed by the Commission. For instance, in the first week of November 2004, in El Fashir (North Darfur) a government official, reportedly

the chief of the local office of the National Security and Intelligence Service, gave money to some IDPs and urged them not to talk to the Commission. It was also reported to the Commission that the Sudanese authorities had deployed infiltrators posing as internally displaced persons (IDPs) into some camps such as Abushouk. In the same camp various eyewitnesses reported an episode that could be taken to amount to witness harassment. On 19 December 2004, around 12:30 in the afternoon, approximately twenty vehicles and three trucks drove through the camp. They stopped in the centre of the camp and started shouting: "We killed the *Torabora* (a common word used for indicating the rebels). We killed your fathers, your brothers. You have to sleep forever." Women and children in the vicinity ran away, returning only after the soldiers had left the area. People in the camp were very worried about the safety of the entire camp.

36. In other instances, local authorities refused to allow the Commission's investigative team entry into a camp to interview witnesses. However these cases were settled in due course, after negotiations with the authorities.

(iii.) Cooperation of the Rebels

37. The Commission was in contact only with the two main rebel movements, the JEM and the SLM/A, and generally considers that both groups cooperated with the Commission. The Commission met with representatives and members of the two groups on a number of occasions in the Sudan, as well as outside the country. It met with the leadership of SLM/A and JEM in Asmara (Eritrea), including the Secretary-General and military commanders of the SLM/A, Minnie Arkawi Minawi, the chief negotiator of the SLM/A at the AU-sponsored talks, Dr. Sherif Harir, and the Chairman of the JEM, Dr. Khalil Ibrahim, as well as other senior officials of both groups. Discussions were open and frank, and both organisations provided responses to queries presented by the Commission. In Darfur, the Commission met, on several occasions, with various representatives of the two rebel groups.
38. The Commission received a number of documents from both groups, which included information of a more general nature about Darfur and the Sudan, as well as detailed documentation on specific incidents including names of victims allegedly killed in attacks. However, the Commission was led to believe that the documentary information provided by the rebels would be more extensive and detailed than what in fact was obtained.
39. The Commission was never refused access to areas under the control of the rebels and was able to move freely in these areas. The rebel groups did not interfere with the Commission's investigations of reported incidents involving the rebels.

II. The Historical and Social Background

1. The Sudan

40. In order to understand the current crisis in Darfur, it is important briefly to place the situation in Darfur within a broader context. The Sudan is the largest

country in Africa with a territory covering about 2.5 million square kilometres bordering Egypt in the North, the Red Sea, Eritrea and Ethiopia in the East, Uganda, Kenya and the Democratic Republic of the Congo in the South, and the Central African Republic, Chad and Libya in the West. The Sudan has an estimated population of 39 million inhabitants. About 32% of the population are urban, 68% rural, and about 7% nomads. Islam is the predominant religion, particularly in the North, while Christianity and animist traditional religions are more prevalent in the South. The Sudan is a republic with a federal system of government. There are multiple levels of administration, with 26 States (Wilayaat) subdivided into approximately 120 localities (Mahaliyaat).

41. The elements that constitute national identity in the Sudan are complex. The population of the Sudan is made up of a multitude of tribes and its inhabitants speak more than 130 languages and dialects. An Islamic-African-Arab culture has emerged over the years and has become predominant in the North of the country. The Arabic language is now spoken throughout most of the country and constitutes a “lingua franca” for most Sudanese.
42. The Sudan is considered a Least Developed Country (LDC), and ranks 139 in the 2004 UNDP’s Human Development Index.⁷ There is no adequate national road grid that connects the country, and large parts of the Sudan rely on an agricultural and pastoral subsistence economy. However, commercial agriculture, industrial development as well as limited exploitation of natural resources, in particular following the discovery of oil in the central/southern part of the country, have developed in recent years. From the time of British colonization to date the focus of attention has been on both the central region where the Blue and White Niles meet, since development and construction are centred in Khartoum, and on the fertile region of El Jezzira where long-fiber cotton has been cultivated as the country’s main crop. With the exception of these regions, the rest of the Sudan’s wide territories have remained largely marginalized and neglected, including Darfur and other regions like Kordofan, the Nuba mountains, the East of the Sudan and the South. Even the Northern region between the border with Egypt and Khartoum has remained a desolate, desert area.
43. The Sudan gained independence from British-Egyptian rule on 1 January 1956. Since independence, the country has fluctuated between military regimes and democratic rule. During its 49 years of national rule, the Sudan has experienced 10 years of democracy in the periods 1956 to 1958, 1965 to 1969, and 1985 to 1989. During the remaining time, the Sudan has been ruled by military regimes, which came to power through *coups d’état*.
44. After two years of democratic governance following independence in 1956, General Ibrahim Abbud came to power through a coup in November 1958. Abbud supported the spread of the Arabic language and Islam, a movement which was met with resistance in the South. Unrest in the South increased in 1962, and in 1963 an armed rebellion emerged. Repression by the Government throughout the country increased, and in 1964 student protests in Khartoum led to general public disorder, which soon spread. Abbud resigned as head of

⁷See 2004 UNDP Human Development Report, <http://www.undp.org>.

state and a transitional Government was appointed to serve under the provisional Constitution of 1956.

45. The transitional Government held elections in April and May 1965. A coalition Government headed by a leading politician of the Umma party, Mohammed Ahmed Mahjub, was formed in June 1965. However, the Mahjub Government failed to agree on and implement effective reform policies, and in May 1969 a group of officers led by Colonel Gaafar Mohamed Al-Nimeiri took power. They adopted a one-party socialist ideology, which later changed to political Islam. In February 1972 Nimeiri signed the so-called Addis Ababa agreement with rebels from the South, which provided for a kind of autonomy for the South. This agreement made peace possible for the next 11 years. However, during the last years of his rule, General Nimeiri took several measures to strengthen his grip on power. Following the discovery of oil in the South, Nimeiri implemented measures to ensure the incorporation into the North of the oil-rich areas in the South, and cancelled the grant of autonomy for the South. Furthermore, in September 1983 under the influence of Hassan Al Turabi, the then leader of the National Islamic Front and the Muslim Brotherhood, Nimeiri introduced Sharia rule. All of these steps led to strong reactions in the South, and eventually to the start of the second war with the South in 1983. Other key measures related to the laws governing land ownership and the local/tribal administration systems, as mentioned below.
46. Finally, in April 1985, after 16 years in power, the military Government of Nimeiri was overthrown in a military coup organized by army officers and a Transitional Military Council was put in place under the leadership of General Abed Rahman Siwar Al-Dahab. Elections were organized in 1986, which led to the victory of the Umma party's leader, Sadiq Al-Mahdi, who became Prime Minister. Al-Mahdi's Government lasted less than four years. During this period it started to take some important measures, but was faced with serious challenges, including the continuing war in the South as well as drought and desertification.
47. The current President of the Sudan, General Omar Hassan El-Bashir, assumed power in June 1989, following a military *coup d'état* organized in cooperation with the Muslim Brotherhood. Many Sudanese either were imprisoned or went into exile following the *coup*. Property was confiscated and political parties were banned. El-Bashir, like Nimeiri, was heavily influenced by the main ideologue of the National Islamic Front, Hassan Al-Turabi. Beginning in 1989, the legal and judicial systems were significantly altered to fit the party's version of political Islam.
48. The ruling party's ideological base was modified in 1998 with the drafting and entry into force of a new Constitution on 1 July 1998 and the holding of elections in December the same year. The 1998 Constitution still reflects a strict ideology, provides for a federal system of government and guarantees some important basic rights. The December 1998 elections, which were boycotted by all major opposition parties, resulted in the election of President El-Bashir for a further five-year term, with his National Congress party assuming 340 of the 360 parliamentary seats. Turabi became the Speaker of Parliament. Party members continued to hold key positions and strong influence over the Government, army, security forces, judiciary, academic institutions and the media.

49. In 1999, an internal power struggle within the National Congress resulted in President El-Beshir declaring a state of emergency, dissolving the Parliament, and suspending important provisions of the Constitution, including those related to the structures of the local government in the states. In May 2000, Turabi led a split from the ruling National Congress, in effect establishing a new party called the Popular Congress. Many officials linked to Turabi were dismissed from Government and in May 2001, Turabi himself was placed under house arrest and was later accused of organizing a *coup d'état*. He remains in detention today. At least 70 key members of the Popular Congress presently are detained without charge or trial, and a number have fled the Sudan to exile.
50. Since it erupted in 1983, the internal conflict between the North and the South has had a significant impact on the Sudan in many ways. It is the longest conflict in Africa involving serious human rights abuses and humanitarian disasters. During the conflict, more than 2 million persons have died and 4.5 million persons have been forcibly displaced from their homes. However, following many years of war, and also as a result of heavy international pressure, the Government and the main rebel movement in the South, the Sudan People's Liberation Movement/Army (SPLM/A), initiated peace talks in 2002. The Sudan peace process, under the auspices of the Inter-Governmental Authority on Development (IGAD) and with the support of a *Troika* (The United States of America, the United Kingdom of Great Britain and Northern Ireland and Norway), made significant progress. In July 2002, the parties signed the Machakos Protocol, in which they reached specific agreement on a broad framework, setting forth principles of governance, a transitional process and structures of government as well as on the right to self-determination for the people of southern Sudan. They agreed to continue talks on the outstanding issues of power-sharing, wealth-sharing, and a cease-fire. The IGAD-brokered peace process advanced substantially with the signing in Naivasha (Kenya) of a series of framework protocols in 2003 and 2004. On 31 December 2004, the parties signed two protocols on the implementation modalities and a permanent ceasefire, marking the end of the talks and negotiations in Naivasha. The process culminated on 9 January 2005 when, during an official ceremony, First Vice-President Taha and SPLM/A Chairman John Garang signed the Comprehensive Peace Agreement (CPA), comprising all previously signed documents including the 31 December 2004 protocols. The CPA marks the end of two decades of civil war, calls for a six-month pre-interim period followed by a six-year interim period, which would end with a referendum on the right to self-determination in southern Sudan. The CPA provides for an immediate process leading to the formulation of a national interim constitution. The Committee, composed of seven members from each side, will have eight weeks to draft the Constitution which it then will submit to be submitted to a National Constitutional Review. This Committee will have two weeks to approve the Constitution.

2. Darfur

51. The Darfur region in the western part of the Sudan is a geographically large area comprising approximately 250,000 square kilometres with an estimated population of 6 million persons. Darfur borders with Libya, Chad and the

Central African Republic. Since 1994 the region has been divided administratively into three states of North, South and West Darfur. Like all other states in the Sudan, each of the three states in Darfur is governed by a Governor (*Wali*), appointed by the central Government in Khartoum, and supported by a local administration. Major urban centres include the capitals of the three Darfur states, Nyala in South Darfur, El Geneina in West Darfur, and the capital of North Darfur, El Fashir, which is also the historical capital of the region. In addition, there are a few major towns spread out over the entire region which serve as local administrative and commercial centres. The majority of the population, however, lives in small villages and hamlets, often composed of only a few hundred families. The economy of the three Darfur states is based mainly on subsistence and limited industrial farming, as well as cattle herding.

52. Darfur was a sultanate that emerged in 1650 in the area of the Jebel Marrah plateau and survived with some interruptions until it fell to British hands in 1917 and was incorporated into the Sudan proper.⁸ The region is inhabited by tribal groups that can be classified in different ways. However, distinctions between these groups are not clear-cut, and tend to sharpen when conflicts erupt. Nevertheless, individual allegiances are still heavily determined by tribal affiliations. The historic tribal structure, which dates back many centuries, is still in effect in Darfur although it was weakened by the introduction of local government during the time of Nimeiri's rule. Some of the tribes are predominantly agriculturalist and sedentary, living mainly from crop production during and following the rainy season from July to September. Some of the sedentary tribes also include cattle herders. Among the agriculturalists, one finds the Fur, the Barni, the Tama, the Jebel, the Aranga and the Masaalit. Among the mainly sedentary cattle herders, one of the major groups is the southern Rhezeghat, as well as the Zaghawa. In addition, a number of nomadic and semi-nomadic tribes can also be traditionally found in Darfur herding cattle and camels in Darfur, which include the Taaysha, the Habaneya, the Beni Helba, the Mahameed and others. It should be pointed out that all the tribes of Darfur share the same religion (Islam), and while some of the tribes do possess their own language, Arabic is generally spoken.
53. The issue of land has for long been at the centre of politics in Darfur. Land-ownership in Darfur has been traditionally communal. The traditional division of the land into homelands—so-called “dar”—which are essentially areas to which individual tribes can be said to have a historical claim, is crucial in the local self-perception of the population. The traditional attribution of land to individual tribes in existence today dates back to the beginning of the 20th century when the last sultan of Darfur, Sultan Ali Dinar, decreed this division which was generally accepted by all tribes. While this traditional division of land is not geographically demarcated in an exact manner, some general observations are possible. For instance, in the northern parts of West Darfur and some western parts of North Darfur, the Zaghawa tribe predominates, and the area is also referred to as Dar Zaghawa – the homeland of the

⁸Mohamad, Mohamed Suliman, *Darfur: New Perspective*, (Cambridge: Cambridge Academic Press, 2004) at 17 (Arabic edition).

Zaghawa. In the area around and south of El Geneina, still in West Darfur, the Masaalit tribe has its homeland. While the name Darfur would mean the homeland of the Fur, the actual area where this tribe has its homeland, is located in the centre of the Darfur region, around the Jebel Marrah area, covering an area where the borders of the three states of Darfur meet, but also stretching further into all three states. The Rhezehghat are mainly found in the southern parts of South Darfur. As noted, some tribes, essentially most of the nomadic tribes, do not possess land and have traditionally transited through land belonging to other tribes. Although this traditional division of land into homelands of different tribes has been in existence for many years, extensive intermarriage and socio-economic interconnectedness between the tribes have rendered a clear demarcation of both tribes and homelands less precise or accurate. Nevertheless, the self-perception of people as members of tribes and the social networks connected to the tribal structures remain a central feature of the demographics of Darfur.

54. Historically land was collectively owned by the members of the tribe and its use was determined by the tribal leadership. Tribal leaders had extensive powers to allocate parcels of land to its members for dwelling, grazing, agriculture, or other forms of use. During the 1970s, however, the land laws were changed and individual ownership became possible. Although the land ownership was now attributed to the State, those who possessed land for at least one year could claim legal title. Those who did not have land had additional incentive to demonstrate loyalty to the Government in order to acquire it.
55. In recent years both ecological and demographic transformations have had an impact on inter-tribal relations. Darfur is part of the Great Sahara region, and while it has some agricultural areas, particularly around the Jebel Marrah plateau, most of the region remains arid desert land. Drought and desertification had their impact in the 70s and 80s, and the fight for scarce resources became more intense. In particular, tensions between agriculturalists and cattle herders were affected. Cattle herders in search of pasture and water often invaded the fields and orchards of the agriculturalists, and this led to bloody clashes as described below. Corridors that were agreed upon amongst the tribes to facilitate the movements of cattle for many years were not respected. As fertile land became scarce, settled people's tolerance of the seasonal visitors diminished.⁹
56. Drought and desertification had its impact not only on Darfur but the entire region of the Sahara, which led to increased migration of nomadic groups from Chad, Libya, and other states into the more fertile areas of Darfur. It is generally not disputed that while this immigration was initially absorbed by the indigenous groups in Darfur, the increased influx combined with the tougher

⁹ According to J.D.Fage and W.Tordoff, *A History of Africa*, 4th edn. (London and New York: Routledge, 2002), "there can be little doubt that the lands of the agricultural peoples of the Sudan immediately south of the Sahara have in fact been subject for centuries to raids, infiltration, conquest and settlement by nomadic pastoralists coming from the desert." (at 63–64).

living conditions during the drought led to clashes and tensions between the newcomers and the locals.¹⁰

57. It was customary for the Darfur tribes to solve their differences through traditional law, especially the many disputes which occur between nomadic tribes and sedentary tribes like murders and incidents related to cattle stealing, which can develop into inter-tribal conflicts. Traditionally, disputes between members of tribes were settled peacefully by the respective tribal leaders, who would meet to reach a mutually acceptable solution. The State was then seen as a neutral mediator. But President Nimeiri introduced new structures of local administration and formally abolished the tribal system. The administrators of the new structures, who were appointed by the central Government, had executive and judicial powers. Although the tribes continued to informally resort to the tribal system, this system was significantly weakened. Local leaders were often chosen on the basis of their political loyalty to the regime, rather than their standing in the community. They were sometimes financed and strengthened particularly through the State's security apparatus. This meant that when the State had to step in to resolve traditional conflicts, it was no longer seen as an impartial arbitrator.
58. Inter-tribal conflict was further aggravated by an increased access to weapons, through channels with Chad and Libya in particular. Libya aspired to have a friendly rule in Chad and the attempts to contain Libya's ambitions in the region led several foreign governments to pour arms into the region. In addition, several Chadian armed rebellions were launched from Darfur. The conflict in the South of the Sudan also had its impact on the region through easier access to weapons. As a consequence, each major tribe as well as some villages began to organize militias and villages defence groups, essentially a group of armed men ready to defend and promote the interests of the tribe or the village.

¹⁰ As noted by A. Mosely Lesch, *The Sudan—Contested national Identities* (Bloomington and Indianapolis, Indiana University Press, 1998), "In the westernmost region of Dar Fur, many peoples resented control from Khartoum, and tension between Fur farmers and Rizaikat Arab cattle herders escalated in 1984–5 as drought forced the nomads to encroach upon cultivated land. Fur were angry that the central government let Libyan troops deploy in north-west Dar Fur and permitted rebels from Chad to camp inside Dar Fur, where they joined with Zaghawa tribesmen to raid Fur villages. The SPLA claimed that 6,500 foreign troops were camped in Dar Fur by mid-1988, a number that grew as Libya and the rebels prepared to overthrow the Ndjama government in December 1999. The extent of destruction was indicated in a report in January 1989 that 57 villages had been burned in the Wadi Saleh agricultural district, where nearly 400 had died, 42,000 were displaced and 12,000 tons of food were destroyed. Further attacks by 3,000 *murahiliin* (Arab militias) on Jabal Marra in May 1989 burned 40 villages and left 80,000 homeless. Those government-armed *murahiliin* also attacked displaced persons from the south. In March 1987, in apparent revenge for the SPLA's killing of 150 Rizaikat militiamen while they raided Dinka villages in western Bahr al-Ghazal, Rizaikat *murahiliin* and Arab townspeople killed 1,000 destitute Dinka displaced persons in the largely Arab town of al-Da'ien. When police tried to shelter the Dinka women and children in the police station and on railway cars, the Rizaikat torched the wagons and stormed the police station. The SPLA played no direct role in these conflicts, since the vast distance prevented the SPLA from aiding the Fur groups or protecting the displaced persons." (at 91–2).

59. The tribal clashes in the latter part of the 1980s were essentially between sedentary and nomadic tribes, and in particular between the Fur and a number of Arab nomadic tribes, which had organized themselves in a sort of alliance named the Arab Gathering, while some members of the Fur tribe had created a group called the African Belt. The conflict was mediated by the Government and local tribal leaders in 1990, but tensions remained during the years to come, and clashes between these tribes continued. This further led to resentment among some Darfurians against the Government of El Beshir, which apparently was neither able nor willing effectively to address the unfolding situation in Darfur.
60. In the context of the present conflict in Darfur, and in the years preceding it, the distinction between so-called African and Arab tribes has come to the forefront, and the tribal identity of individuals has increased in significance. The distinction stems, to a large extent, from the cumulative effects of marginalization, competing economic interests and, more recently, from the political polarization which has engulfed the region. The 'Arab' and 'African' distinction that was always more of a passive distinction in the past has now become the reason for standing on different sides of the political divide. The perception of one's self and of others plays a key role in this context.

3. The Current Conflict in Darfur

61. The roots of the present conflict in Darfur are complex. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, and the other factors noted above, deep layers relating to identity, governance, and the emergence of armed rebel movements which enjoy popular support amongst certain tribes, are playing a major role in shaping the current crisis.
62. It appears evident that the two rebel groups in Darfur, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), began organizing themselves in the course of 2001 and 2002 in opposition to the Khartoum Government, which was perceived to be the main cause of the problems in Darfur. While only loosely connected, the two rebel groups cited similar reasons for the rebellion, including socio-economic and political marginalization of Darfur and its people. In addition, the members of the rebel movements were mainly drawn from local village defence groups from particular tribes, which had been formed as a response to increases in attacks by other tribes. Both rebel groups had a clearly stated political agenda involving the entirety of the Sudan, demanding more equal participation in government by all groups and regions of the Sudan. Initially the SLM/A, at that stage named the Darfur Liberation Front, came into existence with an agenda focused on the situation of the people of Darfur, and only later expanded its agenda to cover all of the Sudan. The Justice and Equality Movement based its agenda on a type of manifesto—the "Black Book," published in 2001—which essentially seeks to prove the disparities in the distribution of power and wealth, by noting that Darfur and its populations, as well as some populations of other regions, have been consistently marginalized and not included in influential positions in the central Government in Khartoum. It is noteworthy

that the two movements did not argue their case from a tribal point of view, but rather spoke on behalf of all Darfurians, and mainly directed their attacks at Government installations. It also appears that with regard to policy formulation, the *New Sudan* policy of the SPLM/A in the South had an impact on the SLM/A, while the JEM seemed more influenced by trends of political Islam. Furthermore, it is possible that the fact that the peace negotiations between the Government and the SPLM/A were advancing rapidly, did in some way represent an example to be followed by other groups, since armed struggle would apparently lead to fruitful negotiations with the Government. It should also be recalled that despite this broad policy base, the vast majority of the members of the two rebel movements came from essentially three tribes: The Fur, the Massalit and the Zaghawa.

63. It is generally accepted that the rebel movements began their first military activities in late 2002 and in the beginning of 2003 through attacks mainly directed at local police offices, where the rebels would loot Government property and weaponry. The Government seemed initially to be taken aback by these attacks, but was apparently in no position to retaliate, nor, it appears, did it initially consider the rebellion a serious military matter. Furthermore, for the Government the rebellion came at a particularly inopportune time, as it was in the process of intense peace negotiations with the SPLM/A, and negotiations were advancing rapidly.
64. There are indications that the Government initially was concerned that Chad was involved in the crisis. President El-Beshir travelled to El Fashir, the capital of North Darfur, in April 2003, to meet with the President of Chad, Idriss Deby, along with many local political and tribal leaders of Darfur, seeking to find a solution to the crisis. President Deby assured President El-Beshir that the Government of Chad was not involved in the conflict.
65. In March and April 2003 the rebels attacked Government installations in Kutum, Tine and El Fashir, including the military section of the airport in El Fashir where the rebels destroyed several military aircraft on the ground and killed many soldiers. An air-force commander was later captured by the rebels and was detained for about three months. Despite the efforts of the Government, he was only released following tribal mediation.
66. Most reports indicate that the Government was taken by surprise by the intensity of the attacks, as it was ill-prepared to confront such a rapid military onslaught. Furthermore, the looting by rebels of Government weaponry strengthened their position. An additional problem was the fact that the Government apparently was not in possession of sufficient military resources, as many of its forces were still located in the South, and those present in Darfur were mainly located in the major urban centres. Following initial attacks by the rebels against rural police posts, the Government decided to withdraw most police forces to urban centres. This meant that the Government did not have *de facto* control over the rural areas, which was where the rebels were based. The Government was faced with an additional challenge since the rank and file of the Sudanese armed forces was largely composed of Darfurians, who were probably reluctant to fight "their own" people.

67. From available evidence and a variety of sources including the Government itself, it is apparent that faced with a military threat from two rebel movements and combined with a serious deficit in terms of military capabilities on the ground in Darfur, the Government called upon local tribes to assist in the fighting against the rebels. In this way, it exploited the existing tensions between different tribes.
68. In response to the Government's call, mostly Arab nomadic tribes without a traditional homeland and wishing to settle, given the encroaching desertification, responded to the call. They perhaps found in this an opportunity to be allotted land. One senior government official involved in the recruitment informed the Commission that tribal leaders were paid in terms of grants and gifts on the basis of their recruitment efforts and how many persons they provided. In addition, the Government paid some of the Popular Defence Forces (PDF) staff their salaries through the tribal leaders,¹¹ with State budgets used for these purposes. The Government did not accept recruits from all tribes. One Masaalit leader told the Commission that his tribe was willing to provide approximately one thousand persons to the PDF but, according to this source, the Government did not accept, perhaps on the assumption that the recruits could use this as an opportunity to acquire weapons and then turn against the Government. Some reports also indicate that foreigners, from Chad, Libya and other states, responded to this call and that the Government was more than willing to recruit them.
69. These new "recruits" were to become what the civilian population and others would refer to as the "Janjaweed," a traditional Darfurian term denoting an armed bandit or outlaw on a horse or camel. A more elaborate description of these actors will follow below.
70. Efforts aimed at finding a political solution to the conflict began as early as August 2003 when President Deby of Chad convened a meeting between representatives of the Government and rebel groups in Abeche. The talks, which the JEM refused to join because it considered the Chadian mediation to be biased, led to the signing on 3 September 2003 of an agreement which envisaged a 45-day cessation of hostilities. Several rounds of talks took place thereafter under Chadian mediation. On 8 April 2004, the Government and the SLM/A and JEM signed a humanitarian ceasefire agreement, and in N'Djamena on 28 May they signed an agreement on ceasefire modalities. Subsequent peace talks took place in Addis Ababa, Ethiopia, and in Abuja, Nigeria, under the mediation of the African Union. On 9 November in Abuja, the Government, the SLM/A and the JEM signed two Protocols, one on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur. In the context of further negotiations, the parties have not been able to overcome their differences and identify a comprehensive solution to the conflict.
71. Besides the political negotiations, the African Union also has been playing a leading role, through the African Mission in Sudan (AMIS), in seeking a

¹¹ See section on the Popular Defence Forces below.

solution to the conflict and in monitoring the cease-fire through the establishment of the AU Cease-Fire Commission in Darfur, including the deployment of monitors. In spite of all of these efforts and the signing of several protocols, fighting and violations of the ceasefire between the rebels and the Government and its militias were still being reported in January 2005.

72. Regardless of the fighting between the rebels on the one hand, and the Government and Janjaweed on the other, the most significant element of the conflict has been the attacks on civilians, which has led to the destruction and burning of entire villages, and the displacement of large parts of the civilian population.

SECTION I: THE COMMISSION'S FINDINGS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW BY THE PARTIES

I. Introduction

73. In fulfilling its mandate the Commission had to establish whether reported violations of international human rights law and humanitarian law in Darfur had in fact occurred. In addition, the Commission had to determine whether other, more recent violations had occurred. Before setting out the results of its fact-finding, the Commission must address a few general and preliminary issues.

II. The Nature of The Conflict in Darfur

74. The first such issue relates to the nature of the armed conflict raging in Darfur. This determination is particularly important with regard to the applicability of the relevant rules of international humanitarian law. The distinction is between international armed conflict, non-international or internal armed conflict, and domestic situations of tensions or disturbances. The Geneva Conventions set out an elaborate framework of rules that are applicable to international armed conflict or 'all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties'.¹² Common Article 3 of the Geneva Conventions and Additional Protocol II set out the prerequisite of a non-international armed conflict. It follows from the above definition of an international conflict that a non-international conflict is a conflict without the involvement of two States. Modern international humanitarian law does not legally set out the notion of armed conflict. Additional Protocol II only gives a negative definition which, in addition, seems to narrow the scope of Article 3 common to the Geneva Conventions.¹³ The jurisprudence of the international criminal tribunals has explicitly elaborated on the notion: 'an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed

¹² Common Article 2 (1)

¹³ Article 1(2)

groups or between such groups within a State'.¹⁴ Internal disturbances and tensions, 'such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are generally excluded from the notion of armed conflict.¹⁵

75. The conflict in Darfur opposes the Government of the Sudan to at least two organized armed groups of rebels, namely the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).¹⁶ As noted above, the first two groups of insurgents took up arms against the central authorities in or around 2002. However, the scale of rebel attacks increased noticeably in February 2003. The rebels exercise *de facto* control over some areas of Darfur. The conflict therefore does not merely amount to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of (i) existence of organized armed groups fighting against the central authorities, (ii) control by rebels over part of the territory and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict under common Article 3 of the Geneva Conventions are met.
76. All the parties to the conflict (the Government of the Sudan, the SLA and the JEM) have recognised that this is an internal armed conflict. Among other things, in 2004 the two rebel groups and the Government of the Sudan entered into a number of international agreements, *inter se*, in which they invoke or rely upon the Geneva Conventions.

III. Categories of Persons or Groups Participating in The Armed Conflict

77. This section will briefly review the various groups taking an active part in the armed conflict in Darfur. On the side of the Government, the various elements of the Sudan People's Armed Forces have played a key role in the armed conflict and therefore are described below. In addition, according to the Commission's findings, the National Security and Intelligence Service has a central role and is responsible for the design, planning and implementation of policies associated with the conflict. The Service is often referred to as the *de facto* State power and its influence appears to reach the highest levels of authority. Its mandate and structure are described below. The role of the Government-supported militia, commonly referred to as 'Janjaweed', is also set out below. Finally, the structure and role of the main rebel groups referred to above are explained here in further detail.

¹⁴ See ICTY Appeals Chamber, *Tadić*, *Interlocutory Appeal on Jurisdiction* (1995), § 70.

¹⁵ See Additional Protocol II, Art. 1 (2) and the ICC Statute, Article 8(2)(d) and (f).

¹⁶ A third rebel group recently emerged, namely the National Movement for Reform and Development, NMRD. According to a Report of the UN Secretary-General of 3 December 2004, on 2, 3 and 26 November 2004 the NMRD reportedly attacked four villages around the Kulbus area. It also clashed with armed militias in the Jebel Moon area (see UN doc. S/2004/947, at §10 (f)).

1. *Government Armed Forces*

(i) *General features*

78. The Sudanese armed force is a conventional armed force with a mandate to protect and to maintain internal security.¹⁷ It carries out its mandate through an army, including Popular Defence Force militia and Borders Intelligence, as well as an air force and navy. According to information received by the Commission, currently the army numbers approximately 200,000 in strength, although its logistical capacity was designed for an army of 60,000. Support, in particular air support, therefore goes primarily to priority areas and is re-deployed only after those areas have calmed down. The central command and control of armed forces operations are therefore imperative.

(ii) *Structure*

79. The Commander-in-Chief of the armed forces is the President, although for operational purposes he exercises this power through the Minister of Defence. The Minister appoints a Commander of the Armed Forces and Chief of General Staff who, together with five Deputy Chiefs of Staff (including Operations, Logistics, Administration, Training and Morale), form the 'Committee of the Joint Chiefs of Staff' or 'command group'.

(iii) *Military Intelligence*

80. While Military Intelligence (MI) was once a part of the 'Operations' branch within the armed forces, it now forms an independent branch with its own administration and command. MI has the power to arrest, detain and interrogate. With regard to communication and reporting, the MI branch passes information through the operational chain, as well as directly to the Presidency, through the Chief of the MI branch.

(iv) *Popular Defence Forces*

81. For operational purposes, the Sudanese armed forces can be supplemented by the mobilization of civilians or reservists into the Popular Defence Forces (PDF). The mandate of the PDF derives from the Popular Defence Forces Act of 1989, which defines the PDF as 'Paramilitary forces' made up of Sudanese citizens who meet certain criteria. Article 6 of the Act states that the functions of the PDF are to 'assist the People's Armed Forces and other regular forces whenever needed', 'contribute to the defence of the nation and help to deal with crises and public disasters' and perform 'any other task entrusted to them by the Commander-in-Chief himself or pursuant to a recommendation of the Council.' According to the Act, a body known as 'The Council of the Popular Defence Forces' advises the Commander-in-Chief on matters affecting the PDF, including areas in which the PDF should be established, military training

¹⁷ Article 122, Part VII, Constitution of Sudan.

and education for PDF members, and other issues relating to the duties and activities of the PDF.

82. According to information gathered by the Commission, local government officials are asked by army Headquarters to mobilize and recruit PDF forces through tribal leaders and sheikhs.¹⁸ The *Wali* is responsible for mobilization in each State because he is expected to be familiar with the local tribal leaders. As one tribal leader explained to the Commission, 'in July 2003 the State called on tribal leaders for help. We called on our people to join the PDF. They responded by joining, and started taking orders from the Government as part of the state military apparatus.'
83. The PDF provides arms, uniforms and training to those mobilized, who are then integrated into the regular army for operations. At that point, the recruits come under regular army command and normally wear the same uniform as the unit they are fighting with. One senior commander explained the recruitment and training of PDF soldiers as follows:

'Training is done through central barracks and local barracks in each state. A person comes forward to volunteer. We first determine whether training is needed or not. We then do a security check and a medical check. We compose a list and give it to the military. This is done at both levels—Khartoum and state or local level. We give basic training (for example, on the use of weapons, discipline, . . .) which can take two weeks or so, depending on the individual.'

'A person may come with a horse or camel—we may send them into military operations on their camel or horse. [. . .] Recruits are given weapons and weapons are retrieved again at the end of training.'

84. According to another senior commander, most of the PDF recruits come 'well-versed in firearms and are tough and fit' but 'need training in discipline'. He noted that uniforms, weapons and ammunition were not always returned by recruits following demobilisation, and that weapons and ammunition would at times be distributed through tribal leaders in order to ensure that they are returned on demobilisation.

(v) Borders Intelligence

85. The armed forces also include an operational unit called the 'Borders Intelligence', the primary role of which is to gather information. Members of this unit are recruited from the local population. They are deployed to their areas of origin, according to their experience in the area, knowledge of the tribes, and ability to differentiate between people of different tribal and national origins based on local knowledge. Borders Intelligence guards are under the direct control of the Military Intelligence Officers in the particular Division where

¹⁸See below for details on the relationship between the PDF and the 'Janjaweed'.

they are deployed and otherwise fall under the regular chain of command for the armed forces.

86. While initially Borders Intelligence officers were recruited in relation to the conflict in southern Sudan, the Government began recruiting them during the early stages of the armed conflict in Darfur in late 2002 and early 2003. Some consider this was done as a cover to recruit Janjaweed.¹⁹ According to a senior armed forces commander, Borders Intelligence soldiers are recruited directly into the army in the same way as regular soldiers. An advertisement is made through media channels for volunteers who meet certain criteria, in particular with regard to age, citizenship and fitness. Approximately 3,000 Borders Intelligence soldiers have been recruited in this way and deployed in Darfur.

(vi) Reporting and command structure

87. Planning for all military operations is done in Khartoum by the Committee of the Joint Chiefs of Staff. Orders in relation to a particular operation are passed from the Committee to the Director of Operations, who gives them to the Area Commander. The Area Commander then gives the orders to the Divisional Commander, who shares them with the Brigade Commander for implementation.
88. With regard to reporting, information flows from Battalion level, to the Brigade Commander, to the Divisional Commander, to the Area Commander, to the Director of Operations, and finally to the Deputy Chief of Staff and Command Group. The Command Group reports to the Chief of Staff who reports, if necessary, to the Minister of Defence and finally to the Presidency. Within the army, reporting and all other communications take place up and down the chain of command as with most conventional armed forces.

(vii) National Security and Intelligence Service

89. National Security forces are regular forces whose mission is to oversee the internal and external security of the Sudan, monitor relevant events, analyze the significance and dangers of the same, and recommend protection measures.²⁰ According to information received by the Commission, the National Security and Intelligence Service is one of the most powerful organs in the Sudan. It derives from the National Security Force Act of 1999, as amended in 2001, which states that there shall be an Internal Security Organ in charge of internal security, and a Sudanese Intelligence Organ in charge of external security.²¹
90. National Security Forces act under the general supervision of the President.²² The direct responsibility of the Organ is assumed by the Director-General²³

¹⁹ See below for further details.

²⁰ Article 124, Part VII, Constitution of Sudan.

²¹ Article 5(1) and 5(2), National Security Act.

²² Article 5(3), National Security Act.

²³ Article 5(4), National Security Act.

who is appointed by the President.²⁴ The Director-General is responsible to the President for the execution of his functions and the overall performance of the Organ.²⁵

91. According to the Act, a body known as “The National Security Council” is to be established to oversee the implementation of the security plan of the country; to supervise the progress of security work; to co-ordinate between security organs; to follow-up on the implementation of security policies and programmes; to approve regulations related to the organization of work; and to constitute a technical committee from the organs forming the Council in order to assist in the progress of work.²⁶ The National Security Council is to be constituted of the President, the President’s advisor on security affairs, the Minister of Defence, the Minister of Foreign Relations, the Minister of Internal Affairs, the Minister of Justice, the Director of the Internal Security Organ, and the Director of the Sudanese Intelligence Organ.²⁷
92. The Act also provides for the establishment of the “High Technical Security Committee” which has a mandate to study the security plans presented by the states and the competent organs, submit the plans to the Council for approval, follow-up on implementation, and receive reports with respect thereto. The Committee is to co-ordinate the business of security committees in the various states, with regard to the security plans set out by the Council.²⁸
93. Major General Sallah Abdallah (also known as Sallah Gosh), the Director-General of the National Security and Intelligence Service, informed the Commission of a decision to create one unified service, comprising both the internal and external intelligence. This service was formed in February 2004 and is known as “the National Security and Intelligence Service.” The Director-General told the Commission that he reports at least every second day to the President and/or First Vice-President. While he co-operates with other organs of the Government, he is accountable directly to the President.
94. With regard to the Darfur crisis, the Director-General stated that the National Security and Intelligence Service would gather information and report to the President about the situation. Depending on the nature of the issue, it would also report to the Ministry of Defence, Ministry of Interior, Ministry of Foreign Affairs or Ministry of Humanitarian Affairs. Based on the information received, the President would then instruct the Cabinet. He further stated that the President formed a coordinating Committee in response to the crisis, which was headed by the Minister for Federal Affairs and included Minister of Defence, Minister of Interior, Director of Intelligence, Minister of Foreign Affairs and Minister of Humanitarian Affairs. However, according to the Director-General the Committee has not met in the last 12 months. Instead, each of the relevant Ministries or Organs have dealt individually or bilaterally with the matter under their competence.

²⁴ Article 10(1), National Security Act.

²⁵ Article 10(3), National Security Act

²⁶ Article 35, National Security Act.

²⁷ Article 34(1), National Security Act.

²⁸ Articles 38 and 39, National Security Act.

95. As to the hierarchy within the National Security and Intelligence Service, the Director-General informed the Commission that he has a Deputy, with whom he shares his activities and functions, as well as four Directors. The Service has a desk specifically to address the situation in Darfur, which receives all information regarding the area, including external public information. This unit is responsible for producing and analyzing intelligence. Every unit reports up the chain of command and ultimately every action is reported to the Director-General.
96. The Commission noted that the National Security Force Act, as amended in 2001, gives the security forces wide-reaching powers, including the power to detain without charge or access to a judge for up to nine months. In Khartoum, the Commission interviewed detainees that were held incommunicado by the security forces in "ghost houses" under abhorrent conditions. In some cases, torture, beatings and threats were used during interrogations and so as to extract confessions. Some of the detainees had been held for 11 months without charge, access to a lawyer or communication with family.
97. The security forces collect information on all aspects of life in the three States of Darfur. This information is disseminated to the relevant Ministries for appropriate action. The Director-General confirmed that this information or intelligence may relate to matters such as the presence of rebels and whether or not they have arms. The military may use this information to make operational decisions. While the National Security and Intelligence Service does not give orders to the military, it provides it with information which is used as a basis for operational planning.

2. Government supported and/or controlled militias—the 'Janjaweed'

98. A major question relates to the *militias* in Darfur, often referred to as *Janjaweed*, *fursan* (horsemen, knights), or *mujahedeen*. The term 'Janjaweed', in particular, has been widely used by victims of attacks to describe their attackers. The term has consequently also been used by many international organizations and the media in their reports on the situation in Darfur, and was used by the Security Council in resolution 1564. Victims of attacks have indicated that the Janjaweed were acting with and on behalf of Government forces. In contrast, senior Sudanese State authorities, in Khartoum and in the three Darfur States indicated to the Commission that any violations committed by the Janjaweed have no relationship to State actors. Given the allegedly central role played by the Janjaweed in the acts being investigated by the Commission and given the discrepancy in the understanding of the identity of the Janjaweed and their alleged link with the State, it was essential for the Commission to clarify the character and role of those actors to whom the term is being applied.
99. This section clarifies the concept of 'Janjaweed' and the implications for the determination of international criminal responsibility. As explained below, the Commission has gathered very substantial material which it considers substantiates use of the term 'Janjaweed', in the limited context of the Commission's mandate, as a generic term to describe Arab militia acting, under

the authority, with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions. For this reason, the Commission has chosen to use the term 'Janjaweed' throughout this report, and also because it reflects the language used by the Security Council in the various resolutions concerning Darfur and, most of all, because it is constantly referred to by victims.

(i.) Emergence of the term janjaweed

100. In Darfur the term "Janjaweed" has been used in the past to describe bandits who prey on rural populations through, among other things, the stealing of cattle and highway robbery. The word "Janjaweed" is an Arabic colloquialism from the region, and generally means "a man (a devil) on a horse." The term was used in the tribal conflicts of the 1990s to specifically denote militias from mainly Arab tribes which would attack and destroy the villages of sedentary tribes.
101. The fact that the Janjaweed are described as Arab militias does not imply that all Arabs are fighting on the side of the Janjaweed. In fact, the Commission found that many Arabs in Darfur are opposed to the Janjaweed, and some Arabs are fighting with the rebels, such as certain Arab commanders and their men from the Misseriya and Rizeigat tribes.²⁹ At the same time, many non-Arabs are supporting the Government and serving in its army. Thus, the term "Janjaweed" referred to by victims in Darfur certainly does not mean "Arabs" in general, but rather Arab *militias* raiding their villages and committing other violations.
102. The Commission found that when faced with the rebellion in Darfur launched by two rebel movements in early 2003, the Government called on a number of Arab tribes to assist in the fight. Some tribal leaders with relationships with both local and central Government officials played a key role in recruiting and organizing militia members and liaising with Government officials. One senior Government official, at provincial level, described how an initial Government recruitment of fighting men drew also upon Arab outlaws and, as other reports have described, the recruitment of convicted felons. The Commission also received credible evidence that the ranks of the Janjaweed include fighters from neighbouring countries, primarily Chad and Libya.

(ii.) Uses of the term in the context of current events in Darfur

103. Victims of attacks consistently refer to their attackers as Janjaweed, most often attacking with the support of Government forces. When asked to provide further details, victims report that the Janjaweed attackers are from

²⁹ The Commission was informed of certain Rezeghat in Ed Daien, South Darfur, who had refused to answer the call to join other Arab tribes in the fight and instead joined the SLA.

Arab tribes and, in most instances, attacked on horseback or on camels and were armed with automatic weapons of various types.

104. With the exception of these two precisions, it is probably impossible to define the 'Janjaweed', as used in Darfur today, as a homogenous entity. In particular, actors to whom it has been applied can usually also be described with other terminology. For example, the Commission found that on numerous occasions the term 'Janjaweed' was used, by victims and members of the authorities, to describe particular men who they had named as leaders of attacks on villages in which civilians were killed and rapes were committed. The Commission was later able to confirm that these men were in fact members of the PDF. Separately, the Commission was informed that a senior member of the local authorities had described one man as a local Janjaweed leader. The man was similarly identified by a victim of an attack as being a Janjaweed leader who had conducted attacks in which civilians were killed. Later, the Commission obtained an official Government letter in which Darfur provincial authorities referred to the same man as being a member of the 'Fursan'. Finally, this man himself showed the Commission evidence that he is a member of the PDF. By way of a further example, the Commission confirmed that PDF forces in one State conduct their attacks on horseback and on camels in a specific deployment configuration and using particular types of weapons. Many victims of attacks in the same area and who identified their attackers as Janjaweed, described for the Commission attackers wearing the same uniforms, using the same deployment during the attack and using the same weapons as those employed by local PDF forces. In a further instance, one victim was asked by the Commission to distinguish between Janjaweed, army and police who had allegedly attacked his village. He responded by saying that for himself and other victims they were all the same.
105. These are a few examples, among multiple testimonies and material evidence, confirming for the Commission that, in practice, the term 'Janjaweed' is being used interchangeably with other terms used to describe militia forces working with the Government. Where victims describe their attackers as Janjaweed, these persons might be from a tribal Arab militia, from the PDF or from some other entity, as described below.

(iii.) Organization and structure of Janjaweed

106. The Janjaweed are not organized in one single coherent structure, and the Commission identified three main categories of Janjaweed actor, determined according to their type of affiliation with the Government of Sudan. The first category includes militias which are only loosely affiliated with the Government and which have received weapons and other supplies from the State. These militias are thought to operate primarily under a tribal management structure.³⁰ They are thought to undertake attacks at the request of

³⁰ For instance some Rezeigat witnesses in West Darfur said they have been attacked near Kulbus by "Janjaweed Zaghawa." In this instance, it is clear that they refer to the Zaghawa tribal militias, who likely also attack on horses and camels.

State authorities, but are suspected by the Commission of sometimes also acting on their own initiative to undertake small scale actions to loot property for personal gain.

107. A second category includes militias which are organized in paramilitary structures and in parallel to regular forces, including groups known as “the Strike Force,” the Mujahedeen or the Fursan (the horsemen). Some of these may be headed by officers in the regular army while also controlled by senior tribal leaders. While militias in this category are thought to operate within a defined command structure they do not have any legal basis.
108. A third category of militia includes members of the PDF³¹ and Border Intelligence³² which have a legislative basis under Sudanese law. The PDF fight alongside the regular armed forces.
109. There are links between all three categories. For example, the Commission has received independent testimony that the PDF has supplied uniforms, weapons, ammunition and payments to Arab tribal militia from the first category. The leaders of these tribes meet regularly with the PDF Civilian Co-ordinator, who takes their concerns to the Security Committee of the locality.
110. The Commission has gathered substantial material attesting to the participation of militia from all three categories in committing violations of international human rights and humanitarian law. The Commission has determined, further, that attackers from all 3 categories have been identified by victims and other witnesses as Janjaweed.

(iv) Links between the militias and the State

111. The Commission has established that clear links exist between the State and militias from all three categories. The close relationship between the militias and the PDF, a State institution established by law, demonstrates the strong link between these militias and the State as a whole. In addition, militias from all three categories have received weapons, and regular supplies of ammunition which have been distributed to the militias by the army, by senior civilian authorities at the locality level or, in some instances, by the PDF to the other militias.
112. The PDF take their orders from the army and conduct their attacks on villages under the direct leadership of an army officer with the rank of Captain or Lieutenant. Testimonies of victims consistently depict close coordination in raids between government armed forces and militia men who they have described as Janjaweed and the Commission has very substantial material

³¹ President El-Bashir also confirmed that in order to rein the Janjaweed, they were incorporated in “other areas,” such as the armed forces and the police: see interview on CNN on August 31, 2004, transcript at <http://edition.cnn.com/2004/WORLD/africa/08/31/aman-pour.bashir/index.html>.

³² The existence of the Border Guard is supported by many witness testimonies. In an interview with the Commission, General El Fadil, Deputy-Director of Military Intelligence, said that his department was responsible for recruiting for the ‘Border Guard’, and made a distinction between them and the PDF.

attesting to the participation of all categories of militia in attacks on villages in coordination with attacks or surveillance by Sudanese military aircraft. Numerous sources have reported that Government of Sudan aircraft have been used to supply the Janjaweed with arms.

113. Members of the PDF receive a monthly salary from the State which is paid through the army. The Commission has reports of the tribal militia members, or their leaders, receiving payments for their attacks and one senior Government official involved in the recruitment of militia informed the Commission that tribal leaders were paid in terms of grants and gifts according to the success of their recruitment efforts. In addition, the Commission has substantial testimony that this category of militia has the tacit agreement of the State authorities to loot any property they find and to gain compensation for their attacks in this way. A consistent feature of attacks is the systematic looting of the possessions of villagers, including cash, personal valuable items and, above all, livestock. Indeed, all of these militias operate with almost complete impunity for attacks on villages and related human rights violations. For example, the Commission has substantial testimony indicating that police officers in one locality received orders not to register or investigate complaints made by victims against Janjaweed.
114. A Report of the Secretary-General, pursuant to paragraphs 6 and 13 to 16 of Security Council resolution 1556 (2004) of 30 August 2004³³, mentions that "the Government also accepted that the militias under its influence were not limited to those previously incorporated into the Popular Defence Forces, but also included militias that were outside and later linked with or mobilized to join those forces. This means that the commitment to disarm refers both to the Popular Defence Forces and to militias that have operated in association with them."
115. Confidential documents made available to the Commission further support the above conclusions on links between the militias and the Government, and identify some individuals within the governmental structure who would have had a role in the recruitment of the militias.
116. The Commission does not have exact figures of the numbers of active Janjaweed, however, most sources indicate that in each of Darfur's three states there is at least one large Janjaweed group as well as several smaller ones. One report identified at least 16 Janjaweed camps still active throughout Darfur with names of Janjaweed commanders. According to information obtained by the Commission, Misteria, in North Darfur, is one Janjaweed camp which continues to be used today and which incorporates a militia known as the Border Guards. It was set up as a base for Janjaweed from which they receive training, weapons, ammunition and can eventually be recruited into the PDF structure, into the police, or into the army. The Commission received evidence that civilians have been abducted by leaders of this camp and detained within the camp where they were tortured and used for labour. These civilians were taken out of the camp and hidden during 3 pre-arranged monitoring

³³ S/2004/703

visits by AU forces. In the first half of 2004 the Misteria camp was populated by approximately 7,000 Janjaweed. By the end of 2004 most of these men had been registered as PDF or police and army regular forces. An army officer with the rank of Colonel was stationed in the camp throughout the year and was responsible for training, ammunition stores and paying salaries to the Janjaweed. Two military helicopters visited the camp roughly once a month bringing additional weapons and ammunition. On at least one occasion the camp was visited by an army Brigadier.

(v.) *The position of the Government*

117. Especially since the international community has become aware of the impact of the Janjaweed actions, responses of the Government of the Sudan to the use of the term seems to have been aimed at denying the existence of any links between the State and the Janjaweed; and most officials routinely attribute actions of the Janjaweed to "armed bandits," "uncontrolled elements," or even the SLA and JEM. The Government position has nevertheless been inconsistent, with different officials, both at national and Darfur levels, giving different accounts of the status of the Janjaweed and their links with the State.
118. The Minister of Defence during a press conference on 28 January 2004 invited the media to differentiate between the "rebels," the "Janjaweed," the "Popular Defence Forces (PDF)" and "tribal militias," such as the "militias" of the Fur tribe, and the "Nahayein" of the Zaghawa. He said the PDF are volunteers who aid the armed forces but the Janjaweed are "gangs of armed bandits" with which the government has no relations whatsoever.³⁴ President Bashir intended his pledge on 19 June 2004 to "disarm the Janjaweed" to apply only to the bandits, not the Popular Defence Forces, Popular Police or other tribesmen armed by the state to fight the rebels.³⁵
119. Contrasting with the above, some official statements confirm the relationship between the government and the militias. In a widely publicized comment addressed to the citizens of Kulbus, a town the rebels had failed to overrun in December 2003, the President said: "Our priority from now on is to eliminate the rebellion, and any outlaw element is our target . . . We will use the army, the police, the mujahedeen, the horsemen to get rid of the rebellion."³⁶ The Minister of Justice told the ad hoc delegation of the Committee on Development and Cooperation of the European Parliament during its visit in February 2004 that "the Government made a sort of relationship with the Janjaweed. Now the Janjaweed abuse it. I am sure that

³⁴ "The Minister of Defence meets the media. . .," in Arabic, *al-Adwa*, 29 December 2003.

³⁵ See Akhbar al-Youm and other major newspapers of 23 June 2004. President Bashir said he used the term "Janjaweed" only because "malevolent powers" were employing it to "slander" the government; see the contradiction with the Report of the Secretary-General pursuant to paragraphs 6 and 13 to 16 of Security Council resolution 1556 (2004) of 30 August 2004 mentioned above, where the Government expresses its acceptance to disarm the PDF.

³⁶ "Sudanese president says war against outlaws is government priority," Associated Press, 31 December 2003.

the Government is regretting very much any sort of commitments between them and the Government. We now treat them as outlaws. The devastation they are doing cannot be tolerated at all.”³⁷ On 24 April 2004, the Foreign Minister stated: “The government may have turned a blind eye toward the militias,” he said. “This is true. Because those militias are targeting the rebellion.”³⁸ The Commission has formally requested the Minister on three occasions to provide it with the above statement or any other statement related to the militias, but has not received it.

120. Despite Government statements regretting the actions of the Janjaweed, the various militias’ attacks on villages have continued throughout 2004, with continued Government support.

(vi.) *The question of legal responsibility for acts committed by the Janjaweed*

121. The “Janjaweed” to whom most victims refer in the current conflict are Arab militias that raid the villages of those victims, mounted on horses or camels, and kill, loot, burn and rape. These militias frequently operate with, or are supported by, the Government, as evidenced both by consistent witness testimonies describing Government forces’ support during attacks, the clear patterns in attacks conducted across Darfur over a period of a year, and by the material gathered by the Commission concerning the recruitment, arming and training of militias by the Government. Some militias may, as the Government alleges, sometimes act independently of the Government and take advantage of the general climate of chaos and impunity to attack, loot, burn, destroy, rape, and kill.
122. A major legal question arises with regard to the militias referred to above: who (in addition to the individual perpetrators) is criminally responsible for crimes allegedly committed by Janjaweed?
123. When militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in *Tadić (Appeal)*, at §§ 98–145. Thus they are acting as *de facto* State officials of the Government of Sudan. It follows that, if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning, those crimes, or for failing to prevent or repress them, under the notion of superior responsibility.
124. When militias are incorporated in the PDF and wear uniforms, they acquire, from the viewpoint of international law the status of organs of the Sudan. Their actions and their crimes could be legally attributed to the Government. Hence, as in the preceding class, any crime committed by them involved 38

³⁷ Report by ad hoc delegation of the Committee on Development and Cooperation of the European Parliament of its visit in February 2004.

³⁸ “Sudan Minister Hails U.N. Rights Vote,” Associated Press, Khartoum, The Guardian (London), April 24, 2004.

not only the criminal liability of the perpetrator, but also the responsibility of their superior authorities of the Sudan if they ordered or planned those crimes or failed to prevent or repress such crimes (superior responsibility).

125. On the basis of its investigations, the Commission is confident that the large majority of attacks on villages conducted by the militia have been undertaken with the acquiescence of State officials. The Commission considers that in some limited instances militias have sometimes taken action outside of the direct control of the Government of Sudan and without receiving orders from State officials to conduct such acts. In these circumstances, only individual perpetrators of crimes bear responsibility for such crimes. However, whenever it can be proved that it was the Government that instigated those militias to attack certain tribes, or that the Government provided them with weapons and financial and logistical support, it may be held that (i) the Government incurs international responsibility (vis-à-vis all other member States of the international community) for any violation of international human rights law committed by the militias, and in addition (ii) the relevant officials in the Government may be held criminally accountable, depending on the specific circumstances of each case, for instigating or for aiding and abetting the violations of humanitarian law committed by militias.
126. The Commission wishes to emphasize that, if it is established that the Government used the militias as a “tactic of war,” even in instances where the Janjaweed may have acted without evidence of Government support, Government officials may incur criminal responsibility for joint criminal enterprise to engage in indiscriminate attacks against civilians and murder of civilians. Criminal responsibility may arise because although the Government may have intended to kill rebels and destroy villages for counter-insurgency purposes, it was foreseeable, especially considering the history of conflicts between the tribes and the record of criminality of the Janjaweed, that giving them authorization, or encouragement, to attack their long-term enemies, and creating a climate of total impunity, would lead to the perpetration of serious crimes. The Government of Sudan willingly took that risk.

3. Rebel movement groups

(i.) The Sudan Liberation Movement/Army (SLM/A)

127. The Sudan Liberation Movement/Army (SLM/A) is one of the two main rebel organizations in Darfur. By all accounts, it appears to be the largest in terms of membership and geographical activity. It is composed mainly of Zaghawa, Fur and Masaalit, as well as some members of Arab tribes. The SLM/A initially called itself the Darfur Liberation Front, and at the time was defending a secessionist agenda for Darfur. In a statement released on 14 March 2003, the Darfur Liberation Front changed its name to the Sudan Liberation Movement and the Sudan Liberation Army (SLM/A), and called for a “united democratic Sudan” and for separation between State and religion.
128. The SLM/A claims that all post-independence Governments of the Sudan have pursued policies of marginalization, racial discrimination, exclusion,

exploitation and divisiveness, which in Darfur have disrupted the peaceful coexistence between the region's African and Arab communities. As indicated in its policy statement released in March 2003, "the SLM/A is a national movement that aims along with other like-minded political groups to address and solve the fundamental problems of all of the Sudan. The objective of SLM/A is to create a united democratic Sudan on a new basis of equality, complete restructuring and devolution of power, even development, cultural and political pluralism and moral and material prosperity for all Sudanese."³⁹ It called upon tribes of "Arab background" to join its struggle for democracy. At various occasion it has stated that it was seeking an equitable share for Darfur in the country's distribution of wealth and political power.

129. The SLM/A emphasizes that it has a national agenda and does not argue its case from a tribal perspective, and underlines that its cause is directed against the Khartoum Government, and not the Arab tribes in Darfur: "The Arab tribes and groups are an integral and indivisible component of Darfur social fabric that have been equally marginalized and deprived of their rights to development and genuine political participation. SLM/A firmly opposes and struggles against the Khartoum government's policies of using some Arab tribes and organization such as the Arab Alliance and Quresh to achieve its hegemonic devices that are detrimental both to Arabs and non-Arabs."⁴⁰
130. In addition, it should also be noted that the SLM/A is part of the Sudanese opposition umbrella group, the National Democratic Alliance (NDA), which also includes the Sudan People's Liberation Movement/Army (SPLM/A), the Umma party and other Sudanese opposition parties.
131. The SLM/A, as indicated by its name, is influenced in terms of agenda and structure by its southern counterpart, the SPLM/A. During the Commission's meetings with the SLM/A leadership in Asmara, Eritrea, it was made clear that the group is divided into a political arm, the "Movement," and a military arm, the "Army." At the outset of the conflict, the structure of the SLM/A remained unclear. In October 2003, the SLM/A reportedly held a conference in North Darfur State during which changes in their structure were discussed and a clear division of work proposed between the military and the political wings. Nowadays, and following the discussion members of the Commission had with SLM/A representatives in Eritrea, it appears that the movement's non-military chairman is Abdel Wahid Mohamad al Nur and that the main military leader and the group's Secretary-General is Minnie Arkawi Minawi. The negotiation team in the peace talks with the Government is headed by Dr. Sherif Harir. Little is known about the detailed structure, or about the actual size of the military arm. According to information obtained by the Commission, the SLM/A has acquired most of its weapons through the looting of Government installations, in particular police stations as well as army barracks. Other sources claim that foreign support has also played an important

³⁹ Press Release/Commentary by SLM/A of 14 March 2003, available at <http://www.sudan.net/news/press/postedr/214.shtml>.

⁴⁰ <http://www.sudan.net/news/press/postedr/214.shtml>.

role in the build-up of the SLM/A forces. The Commission, however, was not in a position to confirm this.

132. The Commission obtained little information about the areas controlled by the SLM/A in Darfur. While certain rural areas are said to be under the group's control, given its operation as a mobile guerilla group, these areas of control are not fixed. In the beginning of the conflict most of the fighting seems to have taken place in North and northern West Darfur, while it gradually moved southward into South Darfur during the last months of 2004.

(ii) The Justice and Equality Movement (JEM)

133. Like the SLM/A, the Justice and Equality Movement (JEM) is a Darfur-based rebel movement, which emerged in 2001, and formed part of the armed rebellion against the Government launched in early 2003. In the field, it is difficult to make a distinction between JEM and SLM/A, as most often reports on actions by rebels do not distinguish between the two. It has been reported that members of the JEM have yellow turbans. It also appears that while SLM/A is the larger military actor of the two, the JEM is more political and has a limited military capacity, in particular following the reported split of the group and the ensuing emergence of the NMRD (see below).
134. The JEM is led by Dr. Khalil Ibrahim, a former State Minister who sided with Hassan El Turabi when the latter formed the Popular National Congress in 2000. Various sources of information have stated that the JEM have been backed by Turabi. While Turabi's role in and influence on the JEM remains unclear, after an initial release following two years' detention in October 2003, he reportedly admitted that his party has links with JEM. However during a meeting with the members of the Commission, Dr. Khalil Ibrahim denied such a link, and stated that in fact Turabi was the main reason for the atrocities committed in the Darfur.
135. The "Black Book" appears to be the main ideological base of the JEM. This manifesto, which appeared in 2001, seeks to prove that there has been a total marginalization of Darfur and other regions of the Sudan, in terms of economic and social development, but also of political influence. It presents facts that aim to show, "the imbalance of power and wealth in Sudan." It was meant to be an anatomy of Sudan that revealed the gaps and discrimination in contrast to the positive picture promoted by the Government. The Black Book seeks to show in a meticulous fashion how the Sudan's post-independence administrations have been dominated by three tribes all from the Nile valley north of Khartoum, which only represent about five per cent of the Sudan's population according to the official census. Despite this, the Black Book argues, these three tribes have held between 47 and 70 percent of cabinet positions since 1956, and the presidency up until today. Persons from the North are also reportedly overwhelmingly dominant in the military hierarchy, the judiciary and the provincial administration. According to the Black Book, those leaders have attempted to impose a uniform Arab and Islamic culture on one of the

continent's most heterogeneous societies.⁴¹ The message is designed to appeal to all marginalized Sudanese—whether of Arab, Afro-Arab or African identity, Christian or Muslim. Based on this ideology, the JEM is not only fighting against the marginalization, but also for political change in the country, and has a national agenda directed against the present Government of the Sudan.

136. The Commission obtained very little information about the size and geographic location OF JEM forces in Darfur. Most of its members appear to belong to the Zaghawa tribe, and most JEM activity is reported in the northern parts of West Darfur. The Commission did find information about a number of incidents in which the JEM had been involved in attacks on civilians (see below).
137. In early May 2004, the JEM split into two factions: one group under the leadership of Dr. Khalil, while the other group comprises commanders in the field led by Colonel Gibril. The split reportedly occurred after the field commanders called a conference in Karo, near the Chadian border in North Darfur State, on 23 May 2004. The conference was organized by the commanders to discuss directly with the political leaders the future of the movement and their ideological differences.

(iii.) Other rebel groups

138. During 2004 a number of other rebel groups emerged. The Commission was not in a position to obtain detailed information about any of these groups nor did it meet with any persons openly affiliated with them.
139. One such group is the National Movement for Reconstruction/Reform and Development (NMRD). On 6 June, the NMRD issued a manifesto stating that it was not party to the ceasefire agreement concluded between the Government and the SLM/A and the JEM in April, and that it was going to fight against the Government. The commanders and soldiers of this movement are mainly from the Kobera Zaghawa sub-tribe, a distinct sub-tribe of the Wagi Zaghawa, who are prominent in the SLM/A. The NMRD is particularly active in the Chadian border town of Tine and in the Jabel Moun area in West Darfur state.
140. On 14 December 2004, talks between the Government of the Sudan and an NMRD delegation began in N'djamena, with Chadian mediation. On 17 December the parties signed two protocols, one on humanitarian access and another on security issues in the war zone. The Protocols underscored the N'Djamena Agreement of 8 April on cease-fire and the Addis Ababa Agreement of 28 May on the cease-fire committee and Abuja Protocols of 9 November. Under the protocols, both parties pledged to abide by a comprehensive ceasefire in Darfur, release war prisoners and organize voluntary repatriation for internally displaced persons (IDPs), and refugees.
141. In addition to the NMRD, a small number of new armed groups have emerged, but only very little information is available about their political agenda, composition and activities. One of these groups is named *Korbaj*, which means "whip" in

⁴¹Sudan Tribune: Black book history, William Wallis, 21 August 2004.

Arabic, and is supposedly composed of members of Arab tribes. Another group is named *Al Shahamah*, which in Arabic means “The Nobility Movement,” and was first heard of at the end of September 2004, and is supposedly located in Western Kordofan state, which borders Darfur in the East. The group seeks fair development opportunities for the region, a review of the power and wealth sharing agreement signed between the Government and the Sudan People’s Liberation Movement (SPLM), and a revision of the agreement on administrative arrangements for the Nuba Mountains and the Southern Blue Nile regions. A third group, the Sudanese National Movement for the Eradication of Marginalisation emerged in December 2004 when it claimed responsibility for an attack on Ghubeish in Western Kordofan. Little is known of this groups, but some reports claim it is a splinter group from the SLM/A. None of these three groups are party to any of the agreements signed by the other rebel groups with the Government.

IV. The International Legal Obligations Incumbent Upon The Sudanese Government and The Rebels

142. In order to legally characterise the facts, the Commission must first determine the rules of international human rights law and humanitarian law against which these facts may be evaluated. It is important therefore to set out the relevant international obligations that are binding on both the Government and the rebels.

1. Relevant Rules of International Law Binding the Government of the Sudan

143. Two main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons. The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict.
144. States are responsible under international human rights law to guarantee the protection and preservation of human rights and fundamental freedoms at all times, in war and peace alike. The obligation of the State to refrain from any conduct that violates human rights, as well as the duty to protect those living within its jurisdiction, is inherent in this principle. Additional Protocol II to the Geneva Conventions evokes the protection of human rights law for the human person. This in itself applies the duty of the state to protect also to situations of armed conflict. International human rights law and humanitarian law are, therefore, mutually reinforcing and overlapping in situations of armed conflict.
145. Accountability for serious violations of both international human rights law and international humanitarian law is provided for in the Rome Statute of

the International Criminal Court. The Sudan has signed but not yet ratified the Statute and therefore is bound to refrain from "acts which would defeat the object and purpose" of the Statute.⁴²

146. The following sections will address the particular provisions reflected in these two bodies of law that are applicable to the conflict in Darfur.

(i.) *International human rights law*

147. The Sudan is bound by a number of international treaties on human rights. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). The Sudan has signed, but not yet ratified, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. In contrast, the Sudan has not ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Convention on the Elimination of Discrimination Against Women. At regional level, the Sudan has ratified the African Charter on Human and Peoples' Rights. As a State party to these various treaties, the Sudan is legally bound to respect, protect and fulfil the human rights of those within its jurisdiction.
148. A number of provisions of these treaties are of particular relevance to the armed conflict currently underway in Darfur. These include: (i) the right to life and to not be 'arbitrarily deprived' thereof;⁴³ (ii) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;⁴⁴ (iii) the right not to be subjected to arbitrary arrest or detention;⁴⁵ (iv) the right of persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity;⁴⁶ (v) the right to freedom of movement, to choose one's own residence and hence not to be displaced arbitrarily;⁴⁷ (vi) the right to property,⁴⁸ to adequate housing and not to be

⁴² Article 18, Vienna Convention on the Law of Treaties (1969). Ratified by Sudan on 18 April 1990.

⁴³ Article 6(1)ICCPR, Article 4 AC. The Human Rights Committee rightly held that this right is laid down in international norms that are peremptory in nature, or *jus cogens* (General Comment 29, at §11). See CCPRT/C/21/Rev.1/Add.11, 31 August 2001.

⁴⁴ Article 7 ICCPR, Article 5 AC. The Human Rights Committee rightly held that this right is recognized in norms that belong to the corpus of *jus cogens* (General Comment 29, § 11).

⁴⁵ Article 9 ICCPR, Article 6 AC. It is notable that the Human Rights Committee has stated that "the prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law" (General Comment 29, at § 13(b)).

⁴⁶ Article 10 ICCPR.

⁴⁷ Article 12 ICCPR; Article 12(1) AC. The UN Human Rights Committee held this right so important that in its view even a State making a declaration of derogation under Article 4 UNC would not be entitled to engage in forcible deportation or transfer of persons.

⁴⁸ Article 14 AC.

subjected to forced eviction;⁴⁹ (vii) the right to health;⁵⁰ (viii) the right to adequate food⁵¹ and to water;⁵² (ix) the right to fair trial;⁵³ (x) the right to effective remedy for any serious violations of human rights;⁵⁴ (xi) the right to reparation for violations of human rights;⁵⁵ and (xii) the obligation to bring to justice the perpetrators of human rights violations.⁵⁶

149. In the case of a state of emergency, international human rights law contains specific provisions which prescribe the actions of States. In particular, article 4 of the International Covenant on Civil and Political Rights sets out the circumstances under which a State party may derogate temporarily from part of its obligations under the Covenant. Two conditions must be met in order for this article to be invoked: first, there must be a situation that amounts to a public emergency that threatens the life of the nation, and secondly, the state of emergency must be proclaimed officially and in accordance with the constitutional and legal provisions that govern such proclamation and the exercise of emergency powers.⁵⁷ The State also must

⁴⁹ Article 11, ICESCR.

⁵⁰ Article 12, ICESCR; article 24, CRC; article 5 (e) (iv), ICERD; AC article 16.

⁵¹ Article 11, ICESCR.

⁵² Articles 11 and 12, ICESCR. See General Comment 15, Committee on Economic, Social and Cultural Rights, which notes at § 22 that ‘during armed conflict, emergency situation and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law. This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water’ (footnotes omitted).

⁵³ Article 14 ICCPR, Article 7 AC.

⁵⁴ Article 2(3) of the ICCPR and Article 7(1)(a) of the AC. The UN Human Rights Committee rightly held in its aforementioned Comment no. 29 that this right “is inherent in the Covenant as a whole” (§ 14) and therefore may not be derogated from, even if it is not expressly provided for in Article 4.

⁵⁵ Articles 2(3), 9(5) and 14(6) ICCPR. According to General Comment 31, of 26 May 2004, of the UN Human Rights Committee, “Article 2(3) requires that State Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of the Article 2(3), is not discharged.” (UN doc. CCPR/C/21/Rev.1/Add.13, at § 16).

⁵⁶ Article 2(3) ICCPR. See General Comment 31 of the Human Rights Committee, which states that “A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.” (at § 15) and “Where the investigations [of alleged violations of human rights] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with the failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (Article 7), summary and arbitrary killing (Article 6) and enforced disappearance (Articles 7 and 9 and, frequently, 6)” (at § 18).

⁵⁷ General Comment 29, para 2.

immediately inform the other States parties, through the Secretary-General, of the provisions it has derogated from and of the reasons for such measures.⁵⁸ Even during armed conflict, measures derogating from the Covenant 'are allowed only if and to the extent that the situation constitutes a threat to the life of the nation'.⁵⁹ In any event, they must comply with requirements set out in the Covenant itself, including that those measures be limited to the extent strictly required by the exigencies of the situation. Moreover, they must be consistent with other obligations under international law, particularly the rules of international humanitarian law and peremptory norms of international law.⁶⁰

150. Article 4 of the ICCPR clearly specifies the provisions which are non-derogable and which therefore must be respected at all times. These include the right to life; the prohibition of torture or cruel, inhuman or degrading punishment; the prohibition of slavery, the slave trade and servitude; and freedom of thought, conscience and religion. Moreover, measures derogating from the Covenant must not involve discrimination on the ground of race, colour, sex, language, religion or social origin.
151. Other non-derogable 'elements' of the Covenant, as defined by the Human Rights Committee, include the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibition against taking hostages, abductions or unacknowledged detention; certain elements of the rights of minorities to protection; the prohibition of deportation or forcible transfer of population; and the prohibition of propaganda for war and of advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.⁶¹ The obligation to provide effective remedies for any violation of the provisions of article 2, paragraph 3, of the Covenant must be always complied with.⁶²
152. In addition, the protection of those rights recognized as non-derogable require certain procedural safeguards, including judicial guarantees. For example, the right to take proceedings before a court to enable the court to decide on the lawfulness of detention, and remedies such as *habeas corpus* or *amparo*, must not be restricted by derogations under article 4. In other words, 'the provisions of the Covenant relating to procedural safeguards

⁵⁸ See General Comment 29, para 17, where the Committee states that notification 'is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. [. . .] the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law.'

⁵⁹ General Comment 29, para 3.

⁶⁰ General Comment 29, paras 9 and 11.

⁶¹ General Comment 29, para 13.

⁶² General Comment 29, para 14.

may never be made subject to measures that would circumvent the protection of non-derogable rights.’⁶³

153. The Sudan has been under a continuous state of emergency since 1999 and, in December 2004, the Government announced the renewal of the state of emergency for one more year. According to the information available to the Commission, the Government has not taken steps legally to derogate from its obligations under the ICCPR. In any event, whether or not the Sudan has met the necessary conditions to invoke article 4, it is bound at a minimum to respect the non-derogable provisions and ‘elements’ of the Covenant at all times.

(ii.) *International humanitarian law*

154. With regard to international humanitarian law, the Sudan is bound by the four Geneva Conventions of 1949, as well as the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, of 18 September 1997,⁶⁴ whereas it is not bound by the two Additional Protocols of 1977, at least *qua* treaties.⁶⁵ As noted above, the Sudan has signed, but not yet ratified, the Statute of the International Criminal Court and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and is therefore bound to refrain from “acts which would defeat the object and purpose” of that Statute and the Optional Protocol.
155. The Sudan also has signed a number of legally binding international agreements concerning the armed conflict in Darfur, all of which entered into force upon signature. Six of these agreements were made with the two groups of rebels, one was entered into solely with the African Union, and two only with the United Nations.⁶⁶ Most of the Agreements contain provisions on international humanitarian law, in particular on the protection of civilians, as noted below.
156. In addition to international treaties, the Sudan is bound by customary rules of international humanitarian law. These include rules relating to internal armed conflicts, many of which have evolved as a result of State practice and jurisprudence from international, regional and national courts, as well as pronouncements by States, international organizations and armed groups.
157. The core of these customary rules is contained in Article 3 common to the Geneva Conventions. It encapsulates the most fundamental principles related to respect for human dignity, which are to be observed in internal armed conflicts.

⁶³ General Comment 29, para 15.

⁶⁴ Ratified on 13 October 2003.

⁶⁵ On this point see *infra*, §§. . . .

⁶⁶ See the Humanitarian Cease Fire Agreement on the Conflict in Darfur, of 8 April 2004; the Protocol on the Establishment of Humanitarian Assistance in Darfur, of 8 April 2004; the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004, and the Protocol on the Enhancement of the Security Situation in Darfur in Accordance with the N’Djamena Agreement, also of 9 November 2004..

These principles and rules are thus binding upon any State, as well as any insurgent group that has attained some measure of organized structure and effective control over part of the territory. According to the International Court of Justice, the provisions of Article 3 common to the Geneva Conventions "constitute a minimum yardstick" applicable to any armed conflict "and reflect what the Court in 1949 [in the *Corfu Channel* case] called 'elementary considerations of humanity.'"⁶⁷

158. Other customary rules crystallized in the course of diplomatic negotiations for the adoption of the two Additional Protocols of 1977, for the negotiating parties became convinced of the need to respect some fundamental rules, regardless of whether or not they would subsequently ratify the Second Protocol. Yet other rules were adopted at the 1974-77 Diplomatic Conference as provisions that spelled out general principles universally accepted by States. States considered that such provisions partly codified, and partly elaborated upon, general principles, and that they were therefore binding upon all States or insurgents regardless of whether or not the former ratified the Protocols. Subsequent practice by, or attitude of, the vast majority of States showed that over time yet other provisions of the Second Additional Protocol came to be regarded as endowed with a general purport and applicability. Hence they too may be held to be binding on non-party States and rebels.
159. That a body of customary rules regulating internal armed conflicts has thus evolved in the international community is borne out by various elements. For example, some States in their military manuals for their armed forces clearly have stated that the bulk of international humanitarian law also applies to internal conflicts.⁶⁸ Other States have taken a similar attitude with regard to many rules of international humanitarian law.⁶⁹

⁶⁷ *Nicaragua (merits)*, (1986) at § 218.

⁶⁸ For instance see the German Manual (*Humanitarian Law in Armed Conflicts—Manual*, Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992). In § 211, at p. 24, it is stated that "In a non-international armed conflict each party shall be bound to apply, as a minimum, the **fundamental humanitarian provisions of international law** embodied in the four 1949 Geneva Conventions (common Article 3), the 1954 Cultural Property Convention (article 19) and the 1977 Additional Protocol II. German soldiers like their Allies are required to comply with the rules of international humanitarian law in the conduct of military operations in all armed conflict however such conflicts are characterized"; emphasis in the original). See also the British Manual (*The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford, Oxford University Press, 2004). At pp. 384–98 it sets out what the UK Government considers to be "certain principles of customary international law which are applicable to internal armed conflicts" (§ 15.1, at p. 382).

⁶⁹ It is also significant that the United States also took the view that general rules or principles governing internal armed conflicts have evolved. Thus, for instance, before the adoption, in 1968, of General Assembly resolution 2444, which "affirmed" a set of principles to be complied with in any armed conflict, the US representative stated that these principles "constituted a reaffirmation of existing law" (see UN GAOR, 3rd Committee, 23rd Session, 1634th Mtg, at 2). (These principles were worded as follows: "(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That a distinction must be made

160. Moreover, in 1994 the Secretary-General, in proposing to the Security Council the adoption of the Statute of the International Criminal Tribunal for Rwanda, took what he defined as “an expansive approach” to Additional Protocol II. He suggested that the new Tribunal should also pronounce upon violations of Additional Protocol II which, as a whole, “has not yet been universally recognized as part of customary international law” and, in addition, “for the first time criminalize[d] common Article 3 of the four Geneva Conventions.”⁷⁰ Significantly, no member of the Security Council opposed the Secretary-General’s proposal, demonstrating consensus on the need to make headway in the legal regulation of internal conflict and to criminalize deviations from the applicable law. Thus the Tribunal’s Statute in Article 4 grants the Court jurisdiction over violations of common Article 3 of the Geneva Conventions and the Second Additional Protocol, thereby recognizing that those violations constitute international crimes.
161. Furthermore, in 1995, in its judgment in *Tadić (Interlocutory appeal)* the ICTY Appeals Chamber held that the main body of international humanitarian law also applied to internal conflicts as a matter of customary law, and that in addition serious violations of such rules constitute war crimes.⁷¹
162. No less significantly, when the Statute of the International Criminal Court was drafted in Rome in 1998, some States expressly insisted that violations of international humanitarian law should also be regarded as war crimes.⁷² More importantly, no State participating in the Diplomatic Conference opposed the inclusion in the Statute of a set of provisions granting the Court jurisdiction over violations of humanitarian law in internal armed conflict that were held to constitute war crimes.⁷³ This is indicative of the attitude of the vast majority of the member States of the international community towards the international legal regulation of internal armed conflict. Similarly, it is significant that the Statute was signed by 120 States, including the Sudan. This signature, although from the viewpoint of the law of treaties it only produced the limited effect emphasized above is also material from the viewpoint of customary international law:⁷⁴ it proves that the general legal

at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible”). In 1972 the US Department of Defence noted that the resolution in question was “declaratory of existing customary international law” (see 67*American Journal of International Law* (1973), at 124). Similarly, in 1987 the US Deputy Legal Adviser to the State Department stated that “the basic core of Protocol II is, of course, reflected in common Article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process” (in 2*American University Journal of International Law and Politics* (1987), at 430–1).

⁷⁰ See UN doc. S/1995/134 (13 February 1995), at § 12.

⁷¹ §§ 96–127 as well as 128–137.

⁷² For instance, see the statement of the French Foreign Minister M. Védreine, in 44 *Annuaire Français de Droit International* (1998), at 128–9.

⁷³ See Article 8(2) (c)–(f).

⁷⁴ In various decisions international criminal tribunals have attached importance to the adoption of the ICC Statute as indicative of the formation of new rules of customary law or as codifying existing rules. See for instance *Tadić (Appeal, 1999)*.

view evolved in the overwhelming majority of the international community (including the Sudan) to the effect that (i) internal armed conflicts are governed by an extensive set of general rules of international humanitarian law and (ii) serious violations of those rules may involve individual criminal liability.⁷⁵

163. The adoption of the ICC Statute, followed by the Statute of the Special Court for Sierra Leone, can be regarded as the culmination of a law-making process that in a matter of few years led both to the crystallization of a set of customary rules governing internal armed conflict and to the criminalization of serious breaches of such rules (in the sense that individual criminal liability may ensue from serious violations of those rules).
164. This law-making process with regard to internal armed conflict is quite understandable. As a result both of the increasing expansion of human rights doctrines and the mushrooming of civil wars, States came to accept the idea that it did not make sense to afford protection only in *international* wars to civilians and other persons not taking part in armed hostilities: civilians suffer from armed violence in the course of internal conflicts no less than in international wars. It would therefore be inconsistent to leave civilians unprotected in civil wars while protecting them in international armed conflicts. Similarly, it was felt that a modicum of legal regulation of the conduct of hostilities, in particular of the use of means and methods of warfare, was also needed when armed clashes occur not between two States but between a State and insurgents.⁷⁶
165. Customary international rules on internal armed conflict thus tend both to protect civilians, the wounded and the sick from the scourge of armed violence, and to regulate the conduct of hostilities between the parties to the conflict. As pointed out above, they basically develop and specify fundamental human rights principles with regard to internal armed conflicts.
166. For the purposes of this report, it is sufficient to mention here only those customary rules on internal armed conflict which are relevant and applicable to the current armed conflict in Darfur. These include:
 - (i) the distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular

⁷⁵ This legal view was restated in the Statute of the Special Court for Sierra Leone (2000), adopted following an Agreement between the United Nations and the Government of Sierra Leone pursuant to SC resolution 1315(2000). Article 3 of the Statute grants the Special Court jurisdiction over "other serious violations of international humanitarian law," namely attacks on civilians or humanitarian personnel, as well as the conscription or enlistment of children under the age of 15.

⁷⁶ The powerful urge to apply humanitarian law to spare civilian from the horrors of civil wars was expressed in 2000 by the then US Ambassador at large for War Crimes David Scheffer, when he stated in 2000, if "the provisions of Protocol II were followed by rebel and government forces throughout the world, many of the most horrific human tragedies the world has documented within the past decade could have been avoided." See text in S. Murphy (ed.), *United States Practice in International Law*, vol. 1, 1999–2001 (Cambridge, Cambridge University Press, 2002), at 370.

- murder⁷⁷ (this rule was reaffirmed in some agreements concluded by the Government of the Sudan with the rebels);⁷⁸
- (ii) the prohibition on deliberate attacks on civilians;⁷⁹

⁷⁷ The rule is laid down in Common Article 3 of the 1949 Geneva Conventions, has been restated in many cases, and is set out in the 2004 *British Manual on the Law of Armed Conflict* (at § 15.6). It should be noted that in the Report made pursuant to § 5 of the UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN Forces in Somalia, the UN Secretary-General noted that “The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. Plainly a part of contemporary international customary law, they are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of armed conflict than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants.” (UN doc. S/26351, 24 August 1993, Annex, § 12). According to a report of the Inter-American Commission on Human Rights on the human rights situation in Colombia issued in 1999, international humanitarian law prohibits “the launching of attacks against the civilian population and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and parties actively taking part in the hostilities and to direct attacks only against the latter and, inferentially, other legitimate military objectives.” (Third Report on the Human Rights Situation in Colombia, Doc OAS/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, § 40).

See also *Tadić* (ICTY Appeals Chamber), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, (1995), §§ 98, 117, 132; *Kordić and Cerkez*, Case No. IT-95-14/2 (Trial Chamber III), *Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the limited Jurisdictional Reach of Articles 2 and 3*, 2 March 1999, §§ 25–34 (recognizing that Articles 51(2) and 52(1) of Additional Protocol I and Article 13(2) of Additional Protocol II constitute customary international law).

⁷⁸ See Article 2 of the Humanitarian Cease Fire Agreement on the Conflict in Darfur, of 8 April 2004 (each Party undertakes to “refrain from any violence or any other abuse on civilian populations”) as well as Article 2(1) of the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004 (the Parties undertake “to take all steps required to prevent all attacks, threats, intimidation and any other form of violence against civilians by any Party or group, including the Janjaweed and other militias”).

⁷⁹ See *Tadić* (Interlocutory Appeal), at §§100–102. As the International Court of Justice held in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (at § 78), “States must never make civilians the object of attack”. The general rule on the matter was restated and specified in Article 51(2) of the First Additional Protocol of 1977, whereby “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” A similar provision is contained in Article 13(2) of the Second Additional Protocol of 1977. These provisions, in the part concerning the intention to spread terror, may be held to have turned into customary law, if only because they ultimately spell out a notion inherent in the customary law prohibition of any deliberate attack on civilians. See also Article 8(2)(e)(i) of the ICC Statute and Article 4 (a) of the Statute of the Special Court for Sierra Leone. It should also be mentioned that in 1991, replying to a question in Parliament, the German Minister of Foreign affairs condemned “the continued military engagements of Turkish troops against the civilian population in Kurdish areas as a serious violations of international law” (in Bundestag, *Drucksache*, 12/1918, 14 January 1992, at 3).

- (iii) the prohibition on indiscriminate attacks on civilians,⁸⁰ even if there may be a few armed elements among civilians;⁸¹
- (iv) the prohibition on attacks aimed at terrorizing civilians;⁸²
- (v) the prohibition on intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;⁸³
- (vi) the prohibition of attacks against civilian objects;⁸⁴
- (vii) the obligation to take precautions in order to minimize incidental loss and damage as a result of attacks,⁸⁵ such that each party must do everything feasible to ensure that targets are military objectives⁸⁶ and to choose means or methods of combat that will minimise loss of civilians;⁸⁷

Furthermore, in a communiqué concerning Rwanda issued in 1994, the French Ministry of Foreign Affairs condemned “the bombardments against civilian populations who have fled to Goma in Zaïre. . . The attacks on the security of populations are unacceptable” (Communiqué of the Ministry of Foreign Affairs on Rwanda, 17 July 1994, in *Politique étrangère de la France*, July 1994, p. 101).

⁸⁰ This rule was held to be of customary nature in *Tadić (Interlocutory Appeal)*, at §§100–102, is restated and codified in Article 13 of Additional Protocol II, which is to be regarded as a provision codifying customary international law, and is also mentioned in the 2004 *British Manual of the Law of Armed Conflict*, at §§15.6.5 and 15.15–15.15.1.

⁸¹ In a press release concerning the conflict in Lebanon, in 1983 the ICRC stated that “the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people.” (ICRC, Press release no. 1474, Geneva, 4 November 1983). In 1997 in *Tadić* and ICTY Trial Chamber held that “it is clear that the targeted population [of a crime against humanity] must be of predominantly civilian nature. The presence of certain non-civilian elements in the midst does not change the character of the population” (judgment of 7 May 1997, at § 638 and see also § 643).

⁸² See the 2004 *British Manual of the Law of Armed Conflict*, at § 15.8).

⁸³ See § 3 of the Security Council resolution 1502 (2003), as well as Article (8)(2)(e)(iii) of the ICC Statute and Article 4 (b) of the Statute of the Special Court for Sierra Leone).

⁸⁴ Pursuant § 5 of General Assembly Resolution 2675 (XXV, of 9 December 1970), which was adopted unanimously and, according to the 2004 *British Manual of the Law of Armed Conflict*, at §§ 15.9 and 15.9.1, 15.16 and 15.16.1–3).

⁸⁵ See the 2004 *British Manual of the Law of Armed Conflict*, at §§ 15.22–15.22.1.

⁸⁶ See *Zoran Kupreškić and others*, ICTY Trial Chamber, judgment of 14 January 2000, at § 260.

⁸⁷ See for instance the Military Manual of Benin (*Military Manual*, 1995, Fascicule III, pp. 11 and 14 (“Precautions must be taken in the choice of weapons and methods of combat in order to avoid civilian losses and damage to civilian objects. . . The direction and the moment of an attack must be chosen so as to reduce civilian losses and damage to civilian objects as much as possible”), of Germany (*Military Manual*, 1992, at §457), of Kenya (*Law of Armed Conflict Manual*, 1997, Precs no. 4, pp. 1 and 8), of Togo (*Military Manual*, 1996, Fascicule III, pp. 11 and 14), as well as the *Joint Circular on Adherence to International humanitarian Law and Human Rights* of the Philippines (1992, at §2 (c)). See also *Zoran Kupreškić and others*, ICTY Trial Chamber, judgment of 14 January 2000, at § 260.

- (viii) the obligation to ensure that when attacking military objectives, incidental loss to civilians is not disproportionate to the military gain anticipated;⁸⁸
- (ix) the prohibition on destruction and devastation not justified by military necessity;⁸⁹
- (x) the prohibition on the destruction of objects indispensable to the survival of the civilian population;⁹⁰
- (xi) the prohibition on attacks on works and installations containing dangerous forces;⁹¹

⁸⁸ In *Zoran Kupreškić and others*, an ICTY Trial Chamber held in 2000 that “Even if it can be proved that the Muslim population of Ahmici [a village in Bosnia and Herzegovina] was not entirely civilians but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of fullscale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality.” (judgment of 14 January 2000, at § 513). See also some pronouncements of States. For instance, in 2002, in the House of Lords the British Government pointed out that, with regard to the civil war in Chechnya, it had stated to the Russian Government that military “operations must be proportionate and in strict adherence to the rule of law.” (in 73 *British Yearbook of International Law*” 2002, at 955). The point was reiterated by the British Minister for trade in reply to a written question in the House of Lords (*ibidem*, at 957). See also the 2004 *British Manual of the Law of Armed Conflict*, at § 15.22.1. In 1992, in a joint memorandum submitted to the UN, Jordan and the US stated that “the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited” (UN doc. A/C.6/47/3, 28 September 1992, at § 1(h)). In a judgment of 9 December 1985, an Argentinean Court of Appeals held in the *Military Junta case* that the principle of proportionality constitutes a customary international norm on account of its repeated doctrinal approbation. Spain insisted on the principle of proportionality in relation to the internal armed conflicts in Chechnya and in Bosnia and Herzegovina (see the statements in the Spanish Parliament of the Spanish Foreign Minister, in *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid 1995, at 353, 473. In addition, see the 1999 Third Report on Colombia of the Inter-American Commission on Human Rights (Doc. OAS/Se.L/V/II.102 Doc.9, rev.1, 26 February 1999, at §§ 77 and 79). See also the 1999 UN Secretary-General’s *Bulletin*, § 5.5 (with reference to UN forces).

⁸⁹ Rome Statute, at Article 8(2)(e)(xii). See also the 2004 *British Manual of the Law of Armed Conflict*, at §§ 15.17- 15.17.2). Under Article 23(g) of the Hague Regulations, it is prohibited “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”. The grave breaches provisions in the Geneva Conventions also provide for the prohibition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (see First Geneva Convention, Article 50 in fine; Second Geneva Convention, Article 51 in fine; Fourth Geneva Convention, Article 147 in fine; Additional Protocol I, Article 51(1) in fine).

⁹⁰ Article 14 of the Second Additional Protocol; as rightly stated in the 2004 *British Manual of the Law of Armed Conflict*, at § 15.19.1, “the right to life is a non-derogable human right. Violence to the life and person of civilians is prohibited, whatever method is adopted to achieve it. It follows that the destruction of crops, foodstuffs, and water sources, to such an extent that starvation is likely to follow, is also prohibited.”).

⁹¹ Article 15. Additional Protocol II; see also the 2004 *British Manual of the Law of Armed Conflict*, at § 15.21.

- (xii) the protection of cultural objects and places of worship;⁹²
- (xiii) the prohibition on the forcible transfer of civilians;⁹³
- (xiv) the prohibition on torture and any inhuman or cruel treatment or punishment;⁹⁴
- (xv) the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence;⁹⁵
- (xvi) the prohibition on declaring that no quarter will be given;⁹⁶
- (xvii) the prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely;⁹⁷
- (xviii) the prohibition on the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by the world community;⁹⁸
- (xix) the prohibition on collective punishments;⁹⁹
- (xx) the prohibition on the taking of hostages;¹⁰⁰
- (xxi) the prohibition on acts of terrorism;¹⁰¹
- (xxii) the prohibition on pillage;¹⁰²
- (xxiii) the obligation to protect the wounded and the sick;¹⁰³
- (xxiv) the prohibition on the use in armed hostilities of children under the age of 15;¹⁰⁴

⁹² Article 16, Additional Protocol II.

⁹³ Article 17, Additional Protocol II, Article 8(2)(e)(viii) of the Rome Statute, and referred to in the 2004 *British Manual of the Law of Armed Conflict*, at §§ 15.14, 15.14.1-2).

⁹⁴ See common Article 3 (1) (a)).

⁹⁵ See common Article 3, (1) (c).

⁹⁶ See Article 8 (2) (e) (x) of the ICC Statute.

⁹⁷ See common Article 3(1) as well as the 2004 *British Manual of the Law of Armed Conflict*, at § 15.6.4.

⁹⁸ See common Article 3 (1) (d); see also General Comment 29 of the Human Rights Committee, at § 16.

⁹⁹ See Article 4(b) of the Statute of the ICTR and Article 3 (b) of the Statute of the Special Court for Sierra Leone; see also General Comment 29 of the Human Rights Committee, at § 11, according to which any such punishment is contrary to a peremptory rule of international law.

¹⁰⁰ See common Article 3 (1) (b) of the 1949 Geneva Conventions as well as Article 4 (c) of the Statute of the ICTR and Article 3 (c) of the Statute of the Special Court for Sierra Leone).

¹⁰¹ Article 4 (2)(d), Additional Protocol II; Article 4 (d) of the Statute of the ICTR and Article 3 (d) of the Statute of the Special Court. In his Report on the establishment of the Special Court for Sierra Leone, the Secretary-General stated that violations of Article 4 of Additional Protocol II have long been considered crimes under customary international law. See also *Galić*, ICTY Trial Chamber, judgment of 5 December 2003, at § 769.

¹⁰² Article 4 (2) (g), Additional Protocol II and Article 8(2)(e)(v) of the Rome Statute; see also the 2004 *British Manual of the Law of Armed Conflict*, at §§ 15.23-15.23.1.

¹⁰³ Common Article 3 (2) of the Geneva Conventions.

¹⁰⁴ There are two treaty rules that ban conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities

167. It should be emphasized that the international case law and practice indicated above show that serious violations of any of those rules have been criminalized, in that such violations entail individual criminal liability under international law.
168. Having surveyed the relevant rules applicable in the conflict in Darfur, it bears stressing that to a large extent the Government of the Sudan is prepared to consider as binding some general principles and rules laid down in the two Additional Protocols of 1977 and to abide by them, although formally speaking it is not party to such Protocols. This is apparent, for instance, from the Protocol on the Establishment of Humanitarian Assistance in Darfur, signed on 8 April 2004 by the Government of the Sudan with the SLA and JEM, stating in Article 10 (2) that the three parties undertook to respect a corpus of principles, set out as follows:

“The concept and execution of the humanitarian assistance in Darfur will be conform [sic] to the international principles with a view to guarantee that it will be credible, transparent and inclusive, notably: the 1949 Geneva Conventions *and its two 1977 Additional Protocols*; the 1948 Universal Declaration on Human Rights, the 1966 International Convention [sic] on Civil and Public[sic] Rights, the 1952 Geneva Convention on Refugees [sic], the Guiding Principles on Internal Displacement (Deng Principles) and the provisions of General Assembly resolution 46/182” (emphasis added).

169. The reference to the two Protocols clearly implies that the parties to the Agreement intended to accept at least the general principles they lay down. The same implicit recognition of those principles can be inferred from the third preambular paragraph of the Protocol on the Enhancement of the Security Situation in Darfur in Accordance with the N’Djamena Agreement, of 9 November 2004, whereby the three parties condemn “all acts of violence against civilians and violations of human rights and international humanitarian law.” A similar preambular paragraph is also contained in the Protocol on the Improvement of the Humanitarian Situation in Darfur, also of 9 November 2004, where in addition preambular paragraph 10 states that the parties are “*aware* of the need to adhere to the humanitarian principles embodied in the United Nations Charter and other relevant international instruments.”

(see Article 8 (2) (e)(vii) of the ICC Statute and Article 4 (c) of the Statute of the Special Court for Sierra Leone). The Convention on the Rights of the Child, at Article 38,¹⁰⁴ and the Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts raise the minimum age of persons directly participating in armed conflicts to *18 years*, although not in mandatory terms (Article 1 of the Protocol provides that “States Parties shall take *all feasible measures* to ensure that members of their armed forces who have not attained the age of *18 years* do not take a direct part in hostilities” (emphasis added); Article 4 (1) contains a similar provision concerning rebels¹⁰⁴; Articles 2 and 3 regulate the recruitment of children under 18). It may perhaps be held that a general consensus has evolved in the international community on a minimum common denominator: children *under 15* may not take an active part in armed hostilities.

170. Significantly, in Article 8(a) of the Status of Mission Agreement (SOMA) on the Establishment and Management of the Cease Fire Commission in the Darfur Area of the Sudan (CFC), of 4 June 2004, between the Sudan and the African Union, it is provided that "The African Union shall ensure that the CFC conducts its operation in the Sudan with full respect for the principles and rules of international Conventions *applicable to the conduct of military* and diplomatic personnel. These international Conventions include the four Geneva Conventions of 12 August 1949 and their *Additional Protocols of 8 June 1977* and the UNESCO Convention of 14 May 1954 on the Protection of Cultural property in the event of armed conflict and the Vienna Convention on Diplomatic Relations of 18 April 1961" (emphasis added). Article 9 then goes on to provide that "The CFC and the Sudan shall therefore ensure that members of their respective military and civilian personnel are *fully acquainted with the principles and rules of the above mentioned international instruments.*" (emphasis added)
171. The above provisions clearly, albeit implicitly, evince the will of the contracting parties to abide by the various treaties on humanitarian law, including the two Additional Protocols, although these Protocols per se are not binding *qua* treaties on the Sudan.

2. Rules binding rebels

172. The SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above. The same is probably true also for the NMRD.
173. Furthermore, as with the implied acceptance of general international principles and rules on humanitarian law by the Government of the Sudan, such acceptance by rebel groups similarly can be inferred from the provisions of some of the Agreements mentioned above.
174. In addition, the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law. The NMRD concluded two Agreements with the Government of the Sudan on 17 December 2004, one on humanitarian access and the other on security issues in the war zone. In these Agreements the parties pledged to release prisoners of war and organize the voluntary repatriation of internally displaced persons and refugees.

V. Categories of International Crimes

175. Serious violations of human rights law and humanitarian law may amount to international crimes, subject to the conditions set out by the ICTY in *Tadić* (*Interlocutory Appeal*) and largely codified in the ICC Statute. In other words,

these violations may entail the individual criminal liability of their author or authors. These violations may also involve the international responsibility of the State or of the international non-state entity to which those authors belong as officials (or for which they acted as *de facto* organs), with the consequence that the State or the non-state-entity may have to pay compensation to the victims of those violations.

176. It is now necessary briefly to mention the various categories of crimes that might be involved in this process of legal classification.
177. *War crimes*. This class of international crimes embraces any serious violation of international humanitarian law committed in the course of an international or internal armed conflict (whether against enemy civilians or combatants) which entails the individual criminal responsibility of the person breaching that law (see *Tadić (Interlocutory Appeal)*, at § 94). War crimes comprise, for instance, indiscriminate attacks against civilians, ill-treatment or torture of prisoners of war or of detained enemy combatants, rape of civilians, use of unlawful methods or means of warfare, etc.
178. *Crimes against humanity*. These are particularly odious offences constituting a serious attack on human dignity or a grave humiliation or degradation of one or more human beings (for instance, murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape and other forms of sexual violence, persecution, enforced disappearance of persons). What distinguishes this category of crime from that of war crimes is that it is not concerned with isolated or sporadic breaches, but rather with violations, which (i) may occur either in time of peace or of armed conflict, and (ii) constitute part of a *widespread or systematic practice of atrocities (or attacks) committed against the civilian population*.
179. With respect to the objective or material element of crimes against humanity, it should first be noted that “The attack must be either widespread or systematic in nature.”¹⁰⁵ Also, “only the attack, not the individual acts of the accused, must be ‘widespread or systematic.’”¹⁰⁶ As to the meaning of “widespread”, an ICTY Trial Chamber held in *Kordić and Cerkez* that “[A] crime may be widespread or committed on a large scale by the ‘cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.’”¹⁰⁷ It can also consider the number of victims.¹⁰⁸ As for the requirement that the attack be “systematic,” it “requires an organised nature of the acts and the improbability of their random occurrence.”¹⁰⁹ With

¹⁰⁵ See, e.g., *Naletilić and Martinović*, (ICTY Trial Chamber), 31 March 2003, § 236; *Akayesu*, (ICTR Trial Chamber), 2 September 1998, § 579, n. 144.

¹⁰⁶ See *Kunarac, Kovac and Vuković*, (ICTY Trial Chamber), 22 February 2001, § 431.

¹⁰⁷ See *Kordić and Cerkez*, (ICTY Trial Chamber), 26 February 2001, § 179.

¹⁰⁸ See, e.g., *Blaskić*, (ICTY Trial Chamber), 3 March 2000, § 206; *Naletilić and Martinović*, (Trial Chamber), 31 March 2003, § 236; *Kayishema and Ruzindana*, (ICTR Trial Chamber), 21 May 1999, § 123.

¹⁰⁹ *Naletilić and Martinović* (ICTY Trial Chamber), 31 March 2003, § 236; see also *Kunarac, Kovac and Vuković*, (ICTY Appeals Chamber), 12 June 2002, § 94.

regard to the factors to consider in assessing “widespread or systematic,” the ICTY Appeals Chamber rules that a Trial Chamber must “first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic.” “The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack.”¹¹⁰ It is not necessary, but it may be relevant, to prove the attack is “the result of the existence of a policy or plan.”¹¹¹

180. The subjective element or *mens rea* required for this category of crime is twofold: (a) the criminal intent or recklessness required for the underlying crime (murder, extermination, rape, torture, etc.), and (b) knowledge that the offence is part of a widespread or systematic practice. A specific sub-category of crimes against humanity, namely persecution, requires in addition a further mental element: a persecutory or discriminatory animus or intent, namely to subject a person or a group to discrimination, ill-treatment or harassment on religious, racial, political, ethnic, national or other grounds, so as to bring about great suffering or injury to that person or group (see in particular the judgment of an ICTY Trial Chamber in *Zoran Kupreškić and others*, at §§ 616–27).
181. *Genocide*. Considering that Security Council resolution 1556 singled out this category of crime for a specific inquiry of the Commission into whether crimes perpetrated in Darfur can be classified as genocide, it is appropriate to devote a special section, *infra*, to this crime. At this juncture, suffice it to say that, both under the 1948 Convention and the corresponding rules of customary law, genocide comprises various acts against members of a national, ethnic, racial or religious group (killing members of a group, causing serious bodily or mental harm to members of a group; deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of a group to another group), committed with the intent to destroy, in whole or in part, the group.

¹¹⁰ *Kunarac, Kovac and Voković* (Appeals Chamber), 12 June 2002, § 95; see also *Jelisić* (Trial Chamber), 14 December 1999, § 53: “The existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack.”

¹¹¹ *Kunarac, Kovac and Voković*, cit, § 98; *Semanza*, (ICTR Trial Chamber), 15 May 2003, § 329; but see earlier case law: *Blaskić*, (ICTY Trial Chamber), 3 March 2000, § 204; *Kayishema and Ruzindana*, (ICTR Trial Chamber), 21 May 1999, §§ 123, 124, 581.

VI. Violations of International Human Rights and Humanitarian Law—The Commission's Factual and Legal Findings.

1. Overview of violations of international human rights and humanitarian law reported by other bodies.

182. In accordance with its mandate set out by the Security Council, requesting the Commission to “investigate reports of violations of human rights law and international humanitarian law,” the Commission carefully studied reports from different sources including Governments, inter-governmental organizations, various United Nations mechanisms or bodies, as well as non-governmental organizations. Immediately following the establishment of the Commission, a *Note Verbale* was sent out to Member States and international and regional organizations on 28 October 2004, requesting that any relevant information be submitted to the Commission. A similar letter was sent to non-governmental organizations on 2 November 2004. The Commission subsequently received a great number of documents and other material from a wide variety of sources, including the Government of the Sudan. These materials were organized in a database and analyzed by the Commission. The following is a brief account of these reports, which serves to clarify the context of the fact finding and the investigations conducted by the Commission. In the sections following this overview, individual incidents are presented according to the type of violation or international crime identified.
183. Information presented in the earlier reports examined by the Commission is mainly based on witness accounts compiled through interviews of IDPs and refugees. Some of the later reports are based on a broader inquiry drawing from other sources and methods to gather information, including satellite imagery to detect destruction and burning of villages as well as field visits to Darfur itself. These reports have also relied upon findings of researchers and observers from different organizations monitoring the situation in Darfur.
184. Most reports note a pattern of indiscriminate attacks on civilians in villages and communities in all three Darfur states beginning in early 2003. Attacks also took place in 2001 and 2002,¹¹² however the magnitude, intensity and consistency of the attacks increased noticeably beginning in early 2003. It is generally agreed that this escalation coincides with the intensification of the internal armed conflict between the Government and the two rebel movements, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). A large part of the information relates to the impact of this conflict on the civilian population, including reference to the methods of combat employed by the parties, and the counter-insurgency policies of the Government.
185. A common conclusion is that, in its response to the insurgency, the Government has committed acts against the civilian population, directly or through

¹¹² For example, the Commission heard evidence of Government armed forces and Janjaweed attacks on Kabkabiya, North Darfur, in April 2001 and April 2002. According to witness testimonies, on 2 April 2001 the village of Shuba was attacked and looted, and 13 people were killed. On 28 April 2002, 217 houses were burned and 17 people were killed. See case study 2 below.

surrogate armed groups, which amount to gross violations of human rights and humanitarian law. While there has been comparatively less information on violations committed by the rebel groups, some sources have reported incidents of such violations. There is also information that indicates activities of armed elements who have taken advantage of the total collapse of law and order to settle scores in the context of traditional tribal feuds, or to simply loot and raid livestock.

186. There are consistent accounts of a recurrent pattern of attacks on villages and settlements, sometimes involving aerial attacks by helicopter gunships or fixed-wing aircraft (Antonov and MIG), including bombing and strafing with automatic weapons. However, a majority of the attacks reported are ground assaults by the military, the Janjaweed, or a combination of the two. Hundreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages. These incidents have resulted in the massive displacement of large parts of the civilian population within Darfur as well as to neighbouring Chad. The reports indicate that the intensity of the attacks and the atrocities committed in any one village spread such a level of fear that populations from surrounding villages that escaped such attacks also fled to areas of relative security.
187. Except in a few cases, these incidents are reported to have occurred without any military justification in relation to any specific activity of the rebel forces. This has strengthened the general perception amongst observers that the civilian population has been knowingly and deliberately targeted to achieve common or specific objectives and interests of the Government and the Janjaweed.
188. Eye-witness accounts of many incidents published in these reports mention that the assailant forces are in uniform, but make a distinction between the uniforms worn by the regular military and the Janjaweed. A variety of explanations have been offered for this distinction in the reports, including that the Government's Popular Defence Forces (PDF), largely recruited from within the Arab tribes, are included in the term Janjaweed as it is commonly used in the context of this conflict. Others allege that the Government provides the militia with these uniforms as well as weapons and see this as a confirmation of their affiliation and association with the Government.
189. Some reports also contain accounts of military engagements between Government and rebel forces which have resulted in severe violations of the rights of civilian populations, and which demonstrate a complete disregard by the warring parties for their obligations regarding the security of civilians. It is reported that wanton acts of destruction, far exceeding any military imperative, were committed, mostly by Government forces. Janjaweed have featured in some of these incidents contributing to the destruction, particularly by inflicting harm on civilian populations and through wide scale looting in the course of, or following, the battle.
190. Although there is little information on violations committed by the *rebel forces*, there are some reports that they have engaged in indiscriminate attacks resulting in civilian deaths and injuries and destruction of private

property. There are further reports of the killing of wounded and imprisoned soldiers, attacking or launching attacks from protected buildings such as hospitals, abduction of civilians and humanitarian workers, enforced disappearances of Government officials, looting of livestock, commercial vehicles and goods. There are also allegations of the use of child soldiers by the rebels. However, it should be noted that the number of reported violations allegedly committed by the Government forces and the Janjaweed by far exceeds the number of cases reported on rebels.

191. While a majority of the reports are consistent in the description of events and the violations committed, the crimes attributed to the Government forces and Janjaweed have varied according to the differences in the interpretation of the events and the context in which they have occurred. Analyses of facts by most of the observers, nevertheless, suggest that the most serious violations of human rights and humanitarian law have been committed by militias, popularly termed "Janjaweed," at the behest of and with the complicity of the Government, which recruited these elements as a part of its counter-insurgency campaign.
192. Various reports and the media claim to have convincing evidence that areas have been specifically targeted because of the proximity to or the *locus* of rebel activity, but more importantly because of the ethnic composition of the population that inhabits these areas. Almost all entities that have reported on the situation in Darfur have noted that the populations subjected to violations are Darfurians who identify themselves as Africans, distinguishable from the Arab tribes in the region, which are also reported to constitute the majority of the Janjaweed.
193. It is reported that amongst the African tribes, members of the Zaghawa, Fur and Masaalit tribes, which have a marked concentration of population in some areas, have been particularly targeted. This is generally attributed to the fact that the two main rebel groups in Darfur are ethnically African and are largely drawn from these three tribes. It is for this reason that some observers have concluded that a major objective of destruction and depopulation of targeted areas is to eliminate or pre-empt any possibility of support for the rebels.
194. Some reports take into account the historical context of ethnic and tribal politics in Darfur, and differences in the way of life and means of livelihood¹¹³ that have resulted in competing claims over control and utilization of natural resources and land. On this basis, some reports conclude that elements of persecution and 'ethnic cleansing' are present in the pattern of destruction and displacement.
195. This reading of the information by some sources has given an added dimension to the conflict. Reports of deliberate destruction of the very means of

¹¹³ Most reports note that the Arab tribes in Darfur are generally associated with a nomadic lifestyle and the vast majority of the African tribes are sedentary farmers, settled on land allotted to the tribes.

survival of these populations have been seen as a design towards their permanent expulsion from their places of habitation. Many of the sources have suggested that the acts of killings, destruction and forced displacement, taken as a whole, amount to extermination. Some reports have implied, and a few have determined, that the elements of the crime of genocide are present in the patterns and nature of violations committed by the Government and its militias.

196. According to recent reports, even though military offensives and large-scale displacement of civilians in North and West Darfur have diminished in the past few months, probably because large parts of the rural areas under Government control have been emptied of their rural inhabitants, violence there has not ceased. In Government-controlled areas, displaced civilians have remained largely at the mercy of the Janjaweed. Observers have reported that displaced civilians living under Government control in these areas remain virtual prisoners—confined to camps and settlements with inadequate food, shelter and humanitarian assistance, at constant risk of further attacks, rape and looting of their remaining possessions. Even if incidents are reported to the police or other Government officials, little or no action is taken to arrest perpetrators. Government-backed Janjaweed raids on new areas in South Darfur have also been reported. There have also been reports of unidentified “militia incursions” along the border into Chad, often with the apparent aim of raiding cattle and other livestock.
197. Concerns have been expressed that despite the Government’s assurances to the international community, the security situation has not improved. Most IDPs remain afraid to return to their places of origin out of fear of renewed attacks and due to the prevailing situation of impunity for acts of violence committed against the civilian population. Some more recent reports note that Arab populations have begun to settle in a few areas previously occupied by the displaced populations.
198. One report noted that the situation in Darfur was being distorted by international organizations and international media. According to this source, the humanitarian situation was being blown out of proportion by most observers. The cause of the conflict should be mainly ascribed to tribal animosities, while the Government had responded to a rebellion and was also providing humanitarian assistance to the displaced and affected populations.

2. Information provided by the Government of the Sudan

199. As was stated earlier, the Commission met with numerous officials, representing various Governmental sectors, including the Presidency, foreign affairs, justice, defence, interior, local Government, and national security. The meetings took place in Khartoum and in the three states of Darfur. The officials presented the Government’s point of view and policies with regard to the conflict in Darfur. While there are some variations in the views presented, there is a common thread that runs through the official version. In addition, the Government provided the Commission with a considerable amount of material, including documents and video tapes. Some material was also provided in response to specific questions raised by the Commission.

200. The most coherent Governmental perspective on the conflict was presented by a Committee established by the Minister of Interior in his capacity as the President's representative on Darfur. The Committee is composed of six senior officials from the Ministries of Defence and Interior, and the National Security and Intelligence Service and is presided over by a major-general from the army. During three meetings that lasted over 6 hours, the Committee shared with the Commission views, statistics and documents. Most views presented by this Committee were echoed by many other high-ranking officials. Other officials, particularly some working with the Advisory Council on Human Rights, the National Security and Intelligence Service, and the three Governments in the three states of Darfur also presented documents that are reflected below.
201. Like many other Government organs, the Committee asserted that the conflict is tribal. It reported that while the region of Darfur has a history of co-existence between the various tribes in Darfur, there is also a history of tribal conflicts. These conflicts were often resolved through traditional reconciliation conferences, which the Government is now trying to promote. With regard to the identity of various groups and whether they are Arab or African, the Committee maintained that there is no Arab-African divide as inter-marriage amongst the various tribes is common. They also said that "the Sudanese are considered Africans by the Arabs and Arabs by the Africans." Therefore there is no ethnic dimension to the conflict.
202. The Committee also argued that the existence of armed rebellion in Darfur is not new. It listed a number of armed opposition groups in Darfur since 1956. In fact it listed eight different armed movements that emerged in Darfur from independence until today.
203. The Committee attributed the current conflict to seven factors. The first factor is the competition between various tribes, particularly between the sedentary tribes and nomadic tribes over natural resources as a result of desertification. The second factor is the weakening of local administration after it was dissolved by former President Nimeri. This administration was established on the basis of the traditional tribal structures and was in the past capable of containing and mediating conflicts. The third factor is the weak presence of the police. The fourth factor is the interference of foreign actors in the situation in Darfur. The fifth factor is the wide availability of weapons and military uniforms due to other previous conflicts in the region, particularly the Libya-Chad war, and the war in the South. The sixth factor is the politicization of issues and their exploitation by various political opposition parties in the Sudan. The seventh is the scant development and the relative lack of infrastructure of Darfur.
204. The Committee also listed all the tribal conflicts and all the peace agreements that were concluded between the tribes between 1932 and 2004. The list demonstrated that these conflicts were sometimes between so called Arab tribes and African tribes; sometimes between different Arab tribes and sometimes between different African tribes. They were resolved in the traditional ways by the *Ajaweed* (wise men) that were selected by the concerned

tribes to mediate amongst them. The common feature of these conflicts was that they were often between sedentary and the nomadic groups.

205. With regard to the current conflict, the Committee blamed the rebels, particularly the SLA and JEM, for most of the atrocities that took place in Darfur. Its view was that the rebels initiated attacks and that the Government was acting only in a defensive mode. It asserted that the Government sustained serious casualties, particularly highlighting the repeated attacks against the police, the local administration and other law enforcement agents. The Committee stated that 100 such attacks were documented and that they presented a pattern. Documents in police stations were burnt by rebels and criminals were released. The Committee alleged that this led to the phenomena of the Janjaweed. The Committee said that when the Government captured rebel weapons during these attacks, they found that they included types of weapon that do not normally exist in the Sudan, implying that there is foreign sponsorship of the rebellion.
206. The Committee also presented statistics concerning attacks against civilians by the rebels from January 2003 until November 2004. It stated that there were 67 attacks in North Darfur, 60 in South Darfur, and 83 in West Darfur. It highlighted that Kulbus was attacked 27 times by the rebels. It charged the rebels with targeted killings, restriction of movement, levying taxes, obstructing education, looting hospitals, and attacks on humanitarian workers.
207. With regard to attacks on the armed forces during the same period, the Committee stated that from January 2003 until November 2004, there were 19 attacks in North Darfur; 16 in South Darfur; and 8 in West Darfur. The Committee claimed that in Buram some soldiers as well as 13 civilians were killed by rebels inside the hospital. It claimed that most attacks were jointly carried out by SLA and JEM.
208. The Committee provided the Commission with numbers of casualties incurred and of weapons stolen between January 2003 and November 2004. With regard to the army, it was claimed that 937 were killed, 2264 injured, and 629 were missing, and 934 weapons were stolen. With regard to the police, it was claimed that 685 were killed, 500 were injured, 62 were missing, and 1247 weapons were looted. With regard to the security and intelligence apparatus, it was claimed that 64 were killed, 1 was injured, 26 were missing, and 91 weapons were looted. As for civilians, it was claimed that 1990 were killed, 112 were injured and 402 were missing. Significantly, the Committee stated that no weapons were looted from civilians.
209. With regard to population displacement, the Committee maintained that rebels force people out of their homes, who then seek protection in areas controlled by the Government. It further stated that the rebels inhibit IDPs from returning. Some other officials noted that the destruction of villages was a normal consequence of the conflict where civilians had been caught in cross-fire. Some officials even admitted that the Government would track rebels into villages, since this is where they would hide, and that the destruction was caused by the ensuing fighting.

210. With regard to figures on displacement, the Committee said that the Government does not possess accurate figures, but it relies on the figures given by the international organizations. It claimed that the displaced were unwilling to cooperate and attacked Government officials, and that some leaders of the displaced exaggerate figures because they are benefiting from the situation. The Committee said that the Government tries to protect the civilian population, that it does not launch military operations against civilians and only targets rebels. It stated that the IDP camps are now used as places from which to launch attacks against the Government.
211. The Committee maintained that the Government took several initiatives to solve the conflict peacefully, including a conference in El-Fashir held in 2001 to address the roots of problems particularly in and around Jabel Murra, as well as the establishment by the President of a Committee to mediate between the tribes.
212. With regard to the Janjaweed, the Committee, and other officials did not provide a consistent view. While some asserted that they are bandits that come from all tribes, other officials admitted that the Government sought the help of certain tribes and mobilized them. In particular, some interlocutors acknowledged that the Government had provided arms to the non-rebellious tribes and that there was cooperation with some tribal leaders who would receive financial grants to assist in the fight against the rebels. Some openly acknowledged that there had been a process of recruitment into the PDF in the context of the fight with the rebels.
213. The Government also asserted that it had taken measures to compensate those who, in its determination, were the subject of wrongful bombardment. It also stated that it had established an independent national commission of inquiry to examine the reports of violations. The effectiveness of such bodies are discussed in the course of this report.

3. Information provided by the rebel groups

214. As noted above, the Commission met with the leadership of the two main rebel movements, the SLM/A and the JEM in Asmara, Eritrea, as well as with other representatives in Darfur. With regard to the origins of the conflict and the incidents during the conflict both groups had very similar positions.
215. Both argued that since the independence of the Sudan in 1956, Darfur has been marginalized and underdeveloped. The JEM noted that the central Government has been dominated by essentially three Arab tribes from the North of the country, who had consistently marginalized the other main regions (the South, the East, the Nuba Mountains, Kordofan, Blue Nile and Darfur), most of which have raised arms against the Government in response to the oppression, marginalization, "internal colonization" and neglect. The imbalance was illustrated by the fact that the North only represented 4 % of the population, but had by far the greatest influence and power in the central Government. According to the rebel groups, the main strategy of the central Governments has been to maintain power by keeping the other regions

underdeveloped, divided and powerless. The war in the South with more than 2 million dead was an example of the Government's oppression.

216. The SLM/A, in particular, noted the emergence in Darfur in the mid 1980's of an alliance of Arab tribes, the Arab Gathering, which had subsequently also been supported by the "Salvation" Government of El-Beshir against the African tribes. In this context, tribes were seen to be either as "pro-Salvation," or "anti Salvation," and a political and racist agenda in a sense emerged. An important issue was the question of control over land. Since some tribes do not have traditional land allotted to them, and with the conflict over natural resources growing, there was a systematic attempt to evict tribes viewed as "non-Salvation" from their land.
217. In this sense, both rebel movements noted that they had started their activities as a response to the discriminatory and divisive policies of the Government in Khartoum. Both groups noted that their agenda was not tribal and was not directed against the Arab tribes. For this reason, the rebels had directed their attacks against Government installations, and had on purpose avoided attacking Arab tribes.
218. The JEM underlined that its internal regulations contained strong commitments to respect international humanitarian law and international human rights law, and that no civilian targets had been nor would be attacked. The JEM underlined that all its military assets had been procured independently through its own means or acquired by looting from the Government.
219. Both rebel groups stated that the Government supported by Arab militia, the Janjaweed, had attacked civilians throughout Darfur. The Government had created the Janjaweed by training and arming them. The rebel groups stated further that members of the Janjaweed had been recruited from those tribes without a traditional homeland, including Mohameed, Ireigat (Northern Reizegat), Iteifat, Zabalat and Maairiyha, as well as from outside the Sudan from Chad, Cameroon, Mauritania and Algeria. The proof that the Government was linked to the Janjaweed was the fact that attacks were conducted jointly. The main reward for the Janjaweed was the promise of owning land, which also explained the massive forced displacement of the civilian population.
220. According to the JEM, the Government and the Janjaweed have committed genocide by specifically targeting people from African tribes, and specifically the Fur, Masaalit, Zaghawa, Birgit, Aranga, Jebel and Tama. The Government armed forces, the PDF, the National Security and Intelligence Service, the Police and the Janjaweed have, since the beginning of the war, allegedly killed more than 70,000 persons, burned more than 3200 villages and displaced more than 2 million persons. The JEM claimed that the Government had issued an order to the police not to accept or investigate any complaints from African tribes.
221. According to the JEM, extensive rape has been committed by the Government and the Janjaweed, including an alleged mass rape of 120 women in July 2003 in Tawilah. The JEM noted that the fact that no Arab woman had been raped and no Arab village had been destroyed was evidence that the Government was specifically targeting African tribes. In addition, the Government and the

Janjaweed have repeatedly abducted women and children, and systematically looted property, including livestock, cash and utensils.

4. The task of the Commission

222. Taking these reports into account the Commission conducted independent investigations to establish the facts. The conclusions of the Commission are based on the evaluation of the facts gathered or verified through these investigations. However, reports from other sources are relied upon for analysis where the facts reported are consistent with the results of the Commission's own inquiry.
223. It was not possible for the Commission to investigate all of the many hundreds of individually documented incidents reported by other sources. The Commission, therefore, selected incidents and areas that were most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law and with greater possibilities of effective fact-finding. In making this selection, access to the sites of incidents, protection of witnesses and the potential for gathering the necessary evidence were, amongst others, of major consideration.
224. In addition to the material collected by the Commission during its visit to Darfur, the team of investigators working under its direction investigated a large number of incidents covering all three Darfur States (see Annex 4 for details).

5. Two Irrefutable Facts: Massive displacement and large-scale destruction of villages.

225. Results of the fact finding and investigations are presented in the next sections of the report and are analysed in the light of the applicable legal framework as set out in the preceding Section. However, before proceeding, two uncontested facts must be highlighted.
226. At the time of the establishment of the Commission and, subsequently, upon its arrival in the Sudan in November 2004, two irrefutable facts about the situation in Darfur were immediately apparent. Firstly, there were more than one million internally displaced persons (IDPs) inside Darfur (1,65 million according to the United Nations) and more than 200,000 refugees from Darfur in neighbouring Chad to the East of the Sudan. Secondly, there were several hundred destroyed and burned villages and hamlets throughout the three states of Darfur. While the exact number of displaced persons and the number of villages destroyed remain to be determined, the massive displacement and the destruction of villages are facts beyond dispute. All observers and actors agree on this, and it was also confirmed to the Commission during its mission in November by all its interlocutors, be it the Government in Khartoum, the local administration in the three Darfur states, tribal leaders, international organizations and others.
227. The Commission has used these undisputed realities as the starting point for discharging its task to determine what actions led to the situation depicted

by these two undeniable realities, and in particular which crimes resulting from violations of international humanitarian law and human rights were committed in the course of these events, as well as determining the actors responsible for them.

228. Before proceeding with the presentation of the results of the Commission's fact-finding as well as the legal appraisal of these facts, it is worth providing some facts on both the displacement and the destruction, so as to give a clear picture of the magnitude and scale of the situation.

(i.) *Displacement*

229. In its *Darfur Humanitarian Profile No. 8* of November 2004, the Office of Deputy Special Representative of the United Nations Secretary-General for Sudan and the United Nations Resident and Humanitarian Co-ordinator noted that: "The total conflict-affected population in Darfur is estimated at 2.27 million people, one third of the estimated pre-conflict population of 6.3 million. The total number of IDPs in Darfur is estimated at 1.65 million, while the number of affected residents accessed by humanitarian agencies is about 627,000. [. . .] The numbers are highest in West Darfur with a total of 833,036 affected people, which is half of the pre-conflict West Darfur population of 1.6 million. The West Darfur figure includes 652,509 IDPs. South Darfur has 761,030 conflict-affected people, including 595,594 IDPs. North Darfur, registering the lowest number of the three Darfur States, has an estimated 685,200 conflict affected people, of which 403,000 are IDPs." It is also noted that "In addition, [. . .] in the three state capitals—Nyala, El Fashir and Geneina—none of the resident populations are included in the category of conflict affected, in part because their number is relatively large as compared to the IDP population that they are hosting. They are not yet judged to be in need of humanitarian assistance, although many of them may be increasingly vulnerable."¹¹⁴ It is noted that there are 101 locations, most of them camps, throughout the Darfur region hosting IDPs, which include 22 locations in North Darfur, 42 locations in South Darfur and 37 locations in West Darfur. Some camps host up to 70,000 persons while others are more "modest" in size and are host to "only" a few thousand IDPs.
230. In a meeting with the Commissioner-General of the Government Humanitarian Aid Commission, Mr. Hassabo Mohammed Abdelrahman, on 12 January 2005, the Government of the Sudan confirmed to the Commission that the total number of IDPs amounted to 1,651 million, and the total number of conflict affected persons was 627,000. The Commissioner-General noted that the Government was generally in agreement with the figures noted in the *Humanitarian Profile* released by the United Nations (quoted above). It was noted that the 1,65 million IDPs were hosted in 81 camps and safe areas, with 300,000 hosted in actual camps. The Commissioner-General further stated that a total of 400,000 IDPs had returned home; a figure the United Nations could not confirm.

¹¹⁴ *Darfur Humanitarian Profile, No. 8*, November 2004, available at <http://www.unsudanig.org>.

231. In addition, as of 15 November 2004, the Office of the United Nations High Commissioner for Refugees (UNHCR) reported that 203,051 persons from the Darfur region were living in eleven camps and other locations as refugees in eastern Chad, along the border with the Sudan.¹¹⁵
232. The estimated number of conflict-affected populations in Darfur combined with the refugees in Chad (1,65 million IDPs, 627,000 otherwise conflict affected persons, and 203, 051 refugees) reaches the staggering figure of almost 2,5 million persons affected in one way or another—the vast majority by being displaced from their homes.

(ii.) *Destruction of villages*

233. While the massive displacement of population in Darfur became the face of the humanitarian crisis in the region, the widespread destruction of villages constitutes another irrefutable fact.
234. During its visit to Darfur the Commission was able to make a visual estimate of the extent of destruction that had been caused in the course of the current conflict in all three Darfur states. The Commission saw destroyed and partially destroyed villages in aerial exploration over some of the affected areas such as those surrounding Mornei, Habila and Garsila in West Darfur, parts of the Jebel Marrah plateau in South Darfur, and the Tawilah and Kutum area in North Darfur. Many of these villages were abandoned and there were areas comprising several villages which were completely deserted. To verify the facts, the Commission also visited some of the villages regarding which it had received specific information of attacks and destruction, including villages in the localities of Shataya and Masteri which were completely destroyed and abandoned.
235. There is an abundance of sites with evidence of villages burnt, completely or partially, with only shells of outer walls of the traditional circular houses left standing. Water pumps and wells have been destroyed, implements for food processing wrecked, trees and crops were burnt and cut down, both in villages and in the *wadis*,¹¹⁶ which are a major source of water for the rural population. Rural areas in Darfur are not the only scenes of destruction. Several towns also show signs of damage to homes and essential infrastructure such as hospitals, schools, and police stations.
236. The exact number of villages burnt and destroyed has not been counted, but several sources have estimated the extent of destruction through verbal accounts, site inspections and other evidence. According to some estimates over 700 villages in all the three states of Darfur have been completely or partially destroyed¹¹⁷. The Commission further received information that the police had made an assessment of the destruction and recorded the number

¹¹⁵ UNHCR data, <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=MEDIA&id=401159eca&page=publ>.

¹¹⁶ *Wadi*: A mainly dry water course in arid regions through which water flows only after heavy rainfalls.

¹¹⁷ Most sources assess that 600 villages and hamlets have been completely destroyed, while an additional 100 to 200 villages have been partially destroyed.

of destroyed villages at over 2000. The Government did not provide any official figures despite several requests in this regard from the Commission. The Commission nevertheless received credible accounts and itself visited some sites where hundreds of homes were burnt in a single location.

6. Violations committed by the parties

237. The individual sections below give an account of the Commissions factual findings, organized according to the type of violation and the resulting international crime committed. In each section, initially a summary and analysis of the findings reported by other sources is presented. This is followed by an account of the findings made and information collected by the Commission on some individual incidents. Each section deals with the crimes committed by the three categories of actors identified, namely, the Government, the Janjaweed and the rebels. A legal appraisal of the factual findings is then provided.

(i). Indiscriminate attacks on civilians

(a.) Factual findings

238. The Commission reviewed numerous reports of indiscriminate attacks on civilians. An analysis of all accounts by other sources reveals a pattern of indiscriminate attacks on civilians in villages and communities in all three Darfur states beginning in early 2003. Attacks are also reported to have taken place in 2001 and 2002. However the magnitude, intensity and consistency of the attacks increased noticeably beginning in early 2003, in particular following the attack by rebel forces on the airport in El Fashir in April 2003. Attacks on civilians were still ongoing at the time of writing the present report.

239. The Commission also met with and received first hand witness accounts of attacks on civilians from individuals and communities throughout the three Darfur states, as well as in Khartoum and in refugee sites in Chad. Reports received by the Commission were verified wherever possible through the work of the judicial investigators, forensic experts and military analysts assigned to work with the Commission. The Commission also received and verified numerous additional incidents involving attacks on civilians, based on information and evidence it received during the course of its work. These are illustrated through several case studies outlined in the sections below.

240. From all accounts the Commission finds that the vast majority of attacks on civilians in villages have been carried out by Government of the Sudan armed forces and Janjaweed, either acting independently or jointly. Although attacks by rebel forces have also taken place, the Commission has found no evidence that these are widespread or that they have been systematically targeted against the civilian population. Incidents of rebel attacks are mostly against military targets, police or security forces. Nevertheless, there are a few incidents in which rebel attacks have been carried out against civilians

and civilian structures, as well as humanitarian convoys. The following sections provide a description of the Commission's factual findings in relation to the patterns of attacks on civilians in the three Darfur states.

(1). Attacks by Government armed forces and the Janjaweed

241. Based on its analysis of other sources and its own investigative work, the Commission found that attacks on villages in Darfur conducted by Government of the Sudan armed forces and the Janjaweed took place throughout the conflict with peaks in intensity during certain periods. Most often the attacks began in the early morning, just before sunrise between 04:30 AM and 08:00 AM when villagers were either asleep or at prayer. In many cases the attacks lasted for several hours. Some villages were attacked repeatedly over the course of several days and months.¹¹⁸
242. In many cases a ground attack began with soldiers appearing in Land Cruisers and other vehicles, followed by a large group of Janjaweed on horses and camels, all with weapons such as AK47s, G3s and rocket-propelled grenades. Many of the attacks involved the killing of civilians, including women and children, the burning of houses, schools and other civilian structures, as well as the destruction of wells, hospitals and shops. Looting and theft of civilian property, in particular livestock, invariably followed the attacks and in many instances every single item of moveable property was either stolen or destroyed by the attackers. Often the civilians were forcibly displaced as a result of the attack.
243. Several of the attacks on villages were carried out with the support of Government of the Sudan including the air force, involving air bombardments and regular aerial surveillance. The Commission received credible evidence of the use of Mi-8 helicopters, Mi-24 helicopters and Antonov aircraft during air attacks on villages. Ground attacks frequently were preceded by the presence of aircraft near or directly above the villages, which would either bomb the village or surrounding areas, or circle over the village and retreat.¹¹⁹ In some cases, aircraft were used for reconnaissance purposes

¹¹⁸ For example, the village of Shuba, North Darfur was attacked by Janjaweed in April 2001 and April 2002, and by Government armed forces and Janjaweed in July 2003. The village of Amaki Sara, South Darfur reportedly was attacked by Janjaweed in September 2002, and by Government armed forces and Janjaweed on 30 October 2004, while rebel forces attacked a school in the village where police had established its headquarters on 2 October 2004.

¹¹⁹ For example, the Commission verified evidence of an attack on Amaki Sara, South Darfur, on 30 October, 2004. At 1300hrs that day, soldiers on foot attacked from the south-west of the village. At 1400hrs, the soldiers were joined by an air attack by two helicopters, both identified by witnesses from sketches as Mi-24, and 2 fixed-wing aircraft (1 x 4-prop Antonov and 1 x 2-prop Antonov, both had white upper fuselage with a black belly). The attack started from the direction of the large hill in the south-west of the village and circled it. The helicopters shot the people who were working in the fields but did not fire on the village. The fixed-wing aircraft only circled without firing weapons. As soon as the attack started, the villagers rapidly evacuated the area splitting to the north and south. Continuing to circle, the helicopters

or to control and inform troops on the ground, while in other cases air support was used to supply ground troops with additional weapons and ammunition.¹²⁰ Several incidents involved aerial bombardment of areas surrounding the villages and/or bombing of civilians and civilian structures within villages themselves. The fact that some of the attacks received aerial support presents a clear indication of the link between the Janjaweed and the Government of the Sudan.

244. The effect of the repeated attacks on villages and the manner in which they were carried out, including regular aerial surveillance at dawn, hovering of helicopter gun-ships and frequent bombing, was to terrorise civilians and force them to flee the villages. Those who managed to find refuge in IDP camps or host communities often refused to return to their villages out of fear of further attacks.
245. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. When asked why they believed they were attacked, some witnesses stated 'because they want our land and cattle' or 'they want to eliminate us from the area'. Other witnesses referred to statements made by their aggressors during some of the attacks, such as 'you are *Tora Bora*, the SLA are your families', 'the Fur are slaves, we will kill them', 'we are here to eradicate blacks (*nuba*)', 'we will drive you into poverty', 'this is not your land' or 'you are not from here'.¹²¹ When asked about the presence of armed groups within the villages, most witnesses denied the existence of rebels in their villages at the time they were attacked. In a few cases witnesses said that villagers had weapons to protect their livestock and families.
246. While in many cases witnesses clearly identified the attackers as Government soldiers or Janjaweed, the exact identity of individual perpetrators was difficult to ascertain. In most cases the attackers wore uniforms, similar to military uniforms, and either military caps or turbans, and were mounted on camels or horses. In at least one incident, witnesses identified Janjaweed by a horse-like sign worn on the shoulder (reportedly the emblem of the PDF). Victims were able in some cases to identify individual perpetrators as either neighbours or recognized leaders of particular Arab tribes. A few incidents seem to have involved the police

fired 57mm rockets at the escaping villagers who the witnesses insist were unarmed. The helicopters appeared to deliberately target people hiding beneath trees and bushes south of the village. Two rockets hit an area beneath some trees and injured several persons. Similarly, two more rockets hit an area of bushes where villagers were attempting to hide, injuring several more. Janjaweed later looted the village.

¹²⁰ On 22nd August 2003 at 0500hrs, a joint force of Government armed forces and Janjaweed, approx 300–400 in strength, attacked the villages of Namai, Bogah and Debsa in North Darfur. Government soldiers used six Toyota pick-ups, camouflage green in colour with machine guns fitted to them, while the Janjaweed rode on horses and camels. An Mi-8 helicopter landed twice to the rear of the attackers, unloading ammunition on both occasions.

¹²¹ See also Section II on Genocide.

acting together with Government armed forces and Janjaweed.¹²² One of the cases reported to the Commission explicitly referred to the involvement in the attacks of the PDF, together with regular Government armed forces and Janjaweed. In most cases, however, victims did not differentiate between Government armed forces on the one hand, and militias, and other groups acting, or perceived to be acting, with the support of Government authorities, on the other. When asked whether the perpetrators were Government armed forces or Janjaweed, one victim stated that 'for us, these are one and the same'.¹²³

247. It should also be noted that the Commission found no evidence of any warnings being issued to civilians prior to the attacks on villages.
248. Many of the ground and air attacks on villages resulted in the indiscriminate killing of civilians.¹²⁴ In most cases of ground attacks, men were directly targeted to be killed and in some cases there is evidence of efforts by the perpetrators to spare the lives of women. However women and children were also victims of killings in the course of many attacks. Several of the attacks also involved sexual violence including rape of women as part of the attack on civilians.¹²⁵ In most cases, victims named Janjaweed as perpetrators of sexual violence; however several incidents allegedly involved Government soldiers acting together with Janjaweed.
249. In this context, the Commission also noted the comments made by Government officials in meetings with the Commission. The Minister of Defence clearly indicated that he considered the presence of even one rebel sufficient for making the whole village a legitimate military target. The Minister stated that once the Government received information that there were rebels within a certain village, 'it is no longer a civilian locality, it becomes a military target.' In his view, 'a village is a small area, not easy to divide into sections, so the whole village becomes a military target.' It is also worth noting that the West Darfur Minister of Social Affairs (who is also the Deputy Wali of the State of West Darfur) considered the villagers responsible for the destruction that led to their massive displacement on the grounds that they allowed their sons to join the rebels and to use their own villages for insurgent activities.

¹²² On 5 October 2003 the village of Haloof in South Darfur reportedly was attacked by Government armed forces and Janjaweed. According to witness testimony, the Janjaweed included two 'policemen'. 24 civilians were killed and several others injured. In a separate incident on 22 May 2004, the village of Abqa Rajil in South Darfur was attacked by Government armed forces and police just before sunrise. Subsequently the Commission obtained information that 6 persons, including 2 policemen, were tried and convicted.

¹²³ Witness testimony regarding the attack on Haloof village, South Darfur, 5 October 2003, as received by members of the Commission during visit to South Darfur.

¹²⁴ Section xx below contains more detailed information on killings as a result of attacks.

¹²⁵ Section xx below contains more detailed information on sexual violence during the course of attacks.

250. The indiscriminate nature of attacks by Government armed forces and the Janjaweed on civilians and civilian objects in villages is illustrated in the case studies below.

Case Study 1: Anka village, North Darfur

251. The Commission investigated the scene of an attack in and around Anka village in North Darfur. The following facts were established through witness interviews and forensic investigations:

At about 9 am on or about the 17 or 18 February 2004 the village of Barey, situated about 5 kilometres from the village of Anka, was attacked by a combined force of Government soldiers and Janjaweed. A witness from Barey then alerted the villagers of Anka of a possible imminent attack.

At about 5 PM on the same day, witnesses from Anka observed between 300 and 400 Janjaweed on foot, and another 100 Janjaweed on camels and horseback, advancing towards Anka from the direction of Barey. The attackers were described as wearing the same khaki uniforms as the Government soldiers, and were armed with Kalashnikovs G3s and rocket-propelled grenades (RPGs).

Witnesses observed about 18 vehicles approaching from behind the Janjaweed forces, including four heavy trucks and eighteen Toyota pickup vehicles. Some of the vehicles were green and others were coloured navy blue. The pickups had Dushka (12.7mm tripod mounted machine guns) fitted onto the back, and one had a Hound rocket launcher system which was used to fire rockets into, and across, the village. The trucks carried Government armed forces and were later used to transport looted property from the village.

According to witnesses, villagers fled the village in a northerly direction, towards a wooded area about 5 kilometers from the village.

Before the Janjaweed entered the village, the Government armed forces bombed the area around the village with Antonov aircraft. One aircraft circled the village while the other one bombed. The first one was coloured white and had a black underside, while the second one was completely white. The bombing lasted for about two hours, during which time 20 to 35 bombs were dropped around the outskirts of the village. A hospital building was hit during the bombardment.

After the bombing the Janjaweed and Government soldiers moved in and looted the village including bedding, clothes and livestock. Remaining buildings were then destroyed by burning. Janjaweed also fired RPGs into the village from the top of the hill overlooking Anka. The bombing of the areas around the village appear to have been conducted in order to facilitate the looting and destruction of the village by Janjaweed and Government armed forces on the ground.

According to witnesses, approximately 30 SLM/A members were present in the village at the time of the attack, apparently to defend the village following the announcement of the imminent attack.

15 civilians were killed in Anka as a result of shrapnel injuries during and after the attack. 8 others were wounded. While some have recovered, others reportedly are disabled as a result of their injuries. The village is now totally deserted.

Case Study 2: Shoba, Kabkabya

252. The Commission received credible information from witnesses in relation to three separate attacks on civilians in villages in the Shoba area, Kabkabya, North Darfur:¹²⁶

The first attack began at 08h30 on 2 April 2001, a market day. Arab militia reportedly attacked Shoba West and Shoba Karika with the intention of looting animals. However, 15 people were killed and nine were wounded as a result of the attack. Approximately 55 Arab militia, wearing camouflage green uniforms and armed with AK47s, G3s and RPGs, attacked the villages on horses and camels. The leader of the attack and the identity of several other attackers were known to the victims and were reported to the police station nearby. The police investigated the incident and arrested four suspected perpetrators, who were still in the village at the time. According to witnesses, no rebels were present in the village either at the time of the attack or at any other time.

Approximately 100 Arab militia attacked Shoba West and Shoba Karika from the north in a second incident on 28 April 2002. The perpetrators of the second attack matched the profile of those responsible for the first attack, and were led this time by two senior leaders of the Arab militia. 24 people were killed during the attack and another 23 were injured. 338 houses were burned, and the north and east of the village were completely destroyed. Property belonging to villagers, including all livestock, food and medicine, was looted. According to witnesses, the attack took place from 04:15 AM until about 09:30 AM when Government forces arrived. Villagers identified the perpetrators, who were about 500 meters from the village with the looted goods. However, the Government soldiers reportedly refused to pursue them and one officer told a witness that he was under instructions not to pursue the attackers. Government armed forces later confiscated the villagers' weapons. Some time following the attack the Minister of Interior visited the area, together with the Walis of the three Darfur states, to appraise the situation and later sent food and support to rebuild the village.

A third attack took place from 05:00 AM to 06:00 PM on 25 July 2003, this time on Shoba East and Shoba West. According to reports, the attack was led by the two senior Janjaweed leaders and involved approximately 400 Janjaweed and Government armed forces using camels, horses and Land Cruisers armed with 12.7mm machine guns. The villages were totally destroyed during the attack. 42 people were killed, 10 were injured and every item of moveable property in the villages was looted.

Case study 3: Adwa

253. The Commission investigated reports of a recent attack by Government armed forces and Janjaweed on the village of Adwa in South Darfur:

According to witnesses, on 23 November 2004 at 06:00 AM Government of the Sudan armed forces in complicity with Janjaweed launched an attack on Adwa.

¹²⁶ This information was corroborated by reported investigations by other independent sources.

Rebel forces reportedly held a base on top of the mountains near Adwa, and a battle between Government soldiers and rebel forces ensued. Two helicopter gunships and an Antonov plane were used during the attack, possibly for reconnaissance purposes. Ground forces used various weapons including AK47, G3, G4 assault rifles, RPG7, machine guns, and Doshka 12,7mm machine gun mounted on vehicles. According to witness reports, civilians including women, children and elderly persons were targeted during the attack. Many were forced to flee to a nearby mountain where they remained for several days. There are reports that Government and Janjaweed armed forces instructed women not to flee and told them that they were not targets. However, some women were captured and several were detained by the attackers for two days. Men were summarily shot, as was anyone who attempted to escape. Young girls were taken by the attackers to another location and many were raped in the presence of other women. The attackers looted the village. While in the mountains, several of the victims reportedly were shot by Government soldiers and Janjaweed. Many people were killed and more than 100 persons were injured. Following the attack, representatives of an international organization searched the village and found several injured women and children, whom they escorted to hospital. They also found the bodies of between 20 and 30 civilians who had been killed during the attack, including women and children. All of the victims were reportedly from Adwa and belonged to the Fur tribe. It is also alleged that many are still to be found in the mountains.

2. Attacks by rebel forces

254. The Commission also found that rebel forces have been responsible for attacks, in most cases against military targets, police or security forces. In West Darfur, for example, rebel forces attacked a police station in Tongfuka in October 2003. In South Darfur, according to witnesses, rebels attacked and looted a police station and Government offices in Yassin in January 2004. In North Darfur, rebel forces attacked a police station in Tawila, killing 28 policemen. According to witness reports, most attacks against military targets by rebel forces have been conducted by the SLM/A, acting either independently or together with rebel forces of the JEM.
255. The Commission also received information from witnesses of a number of attacks by rebel forces on villages and individual civilians. In three separate incidents in West Darfur, members of the JEM attacked the town of Kulbus. During the first attack the JEM arrived around 3:00 PM on 4 October 2003 in 35 Land Cruisers, surprising Government armed forces in the town. Some were wearing military desert camouflage uniforms and others were in civilian clothing, riding horses and camels, and carrying weapons such as RPGs, Garanov, Kalashnikov, GM4, Katyoucha Hawn 106, Hawn 120 and machine guns. Forty-two soldiers and seventeen civilians, all male, were killed along with one child. Fifty civilians were injured. On the 25 and 26 December 2003, more than forty vehicles loaded with JEM soldiers again attacked Kulbus. However, the attackers were held back by Government armed forces and could not get into the town. 28 Government soldiers were killed along with four male civilians.

256. Rebel forces reportedly have been responsible also for attacks reportedly carried out against civilian convoys, including vehicles carrying humanitarian supplies. The Commission received information in relation to attacks and looting by rebels of commercial vehicles, trucks carrying humanitarian supplies, cargo trains or passenger buses. However, the Commission was not able to verify these reports through its own investigations. The Government of the Sudan presented the Commission with a document listing attacks on humanitarian convoys.

Case study—Buram¹²⁷

257. In one particularly serious series of incidents, rebel forces conducted attacks in Buram, South Darfur on three separate occasions:

During the first attack, at 06h00 AM on 13 March 2004, rebels arrived in Buram from the north in eight Land Cruisers, each containing nine or ten soldiers. The attackers wore a variety of different military uniforms. They attacked the local office of the National Security and Intelligence Service setting it alight and then proceeded to shoot at the Sudan Telecommunications office. They then attacked the police station, killing two policemen and removing weapons and ammunition. From there they went to the offices of the local administration where they stole two safes and destroyed official documents. They went to the Zakat (religious tax) office where they destroyed documents, stole the safe and a Mitsubishi pickup truck. They went to the bank where they removed two safes and set fire to the building. They also stole a truck belonging to a civilian. A crowd of people witnessed the incident and followed the attackers. They were apparently unafraid because the rebels had announced that they were not going to hurt anyone other than the targets that they had chosen, including certain officials. The rebels went to the house of the security manager, who reportedly had already fled with his family, set fire to the house and stole the security manager's vehicle. The following morning at 05:00 AM the rebels left town towards Shurab.

At Wadi Haggam they stole weapons from the police. At Hufrat-an-Nahas they attacked a military contingent and killed 17 Government soldiers.

A second attack took place a week later, reportedly by the same perpetrators driving the same vehicles as were used in the first attack. After arriving in the village at 02:00 PM, the attackers went to the prison and released all prisoners. The rebels invited the prisoners to join them, which some did. The attackers set fire to the prison, killed one prison guard and beat another. They then left the village, taking with them the prisoners who had joined them. After the attack, the rebels stated publicly that they had come to liberate the people by force and that they wanted popular support.

Later the rebels became involved in a battle with Government military forces in a location nearby. In that battle, soldiers who had been injured were brought to Baram for medical attention. Rebels fired shots at the hospital buildings and

¹²⁷ See references to killings during these incidents in the section below.

killed both soldiers and civilians. The Commission could not confirm a claim by the Government that injured soldiers and civilians had been killed inside the hospital building.

(b.) Legal appraisal

258. As stated above, various provisions of human rights and international humanitarian law are relevant to the protection of civilians in armed conflict. International law prohibits any attack deliberately directed at civilians, that is, persons that do not take a direct part in armed hostilities. International law also prohibits indiscriminate attacks on civilians, that is, any attack on areas or places where both civilians and combatants may be found, which is not directed at a specific military objective, or employs methods or means of combat which cannot be directed at a specific military objective. Parties to the conflict therefore must at all times distinguish civilians from those taking a direct part in the hostilities, as well as differentiating civilian objects from military objectives. Deliberate attacks on civilian objects are prohibited. The notion of 'civilian objects' embraces all objects (houses, private dwellings, orchards, schools, shelters, hospitals, churches, mosques, synagogues, museums, works of art, and so on) that do not serve, nor are used for, military purposes.
259. To ensure that attacks on places or areas where both civilians and combatants may be found, do not unlawfully jeopardize civilians, international law imposes two fundamental obligations, applicable both in international and internal armed conflicts. First the obligation to take precautions for the purpose of sparing civilians and civilian objects as much as possible. Such precautions, laid down in customary international law, are as follows: a belligerent must (i) do everything feasible to verify that the objectives to be attacked are not civilian in character; (ii) take all feasible precautions in the choice of means and methods of combat with a view to avoiding or at least minimizing incidental injury to civilians or civilian objects; (iii) refrain from launching attacks which may be expected to cause incidental loss of civilian life or injury to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated; (iv) give effective advance warning of attacks which may affect the civilian population, except "in cases of assault" (as provided for in Article 26 of the Hague Regulations of 1907) or (as provided for in Article 57(2)(C)) "unless circumstances do not permit" (namely when a surprise attack is deemed indispensable by a belligerent). Such warnings may take the form of dropping leaflets from aircraft or announcing on the radio that an attack will be carried out. According to the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC, Y. Sandoz and others eds., 1987, at § 2224) a warning can also be given by sending aircraft that fly at very low altitude over the area to be attacked, so as to give civilians the time to evacuate the area.
260. The second fundamental obligation incumbent upon belligerents (or, more broadly, on any party to an international or internal armed conflict)

is to respect the principle of proportionality when conducting attacks on military objectives that may entail civilian losses. Under this principle a belligerent, when attacking a military objective, shall not cause incidental injury to civilians disproportionate to the concrete and direct military advantage anticipated. In the area of combat operations the principle of proportionality remains a largely subjective standard, based on a balancing between the expectation and anticipation of military gain and the actual loss of civilian life or destruction of civilian objects. It nevertheless plays an important role, first of all because it must be applied in good faith, and secondly because its application may involve the prohibition of at least the most glaringly disproportionate injuries to civilians. One can therefore appreciate statements such as that of Judge R. Higgins in her Dissenting Opinion appended to the Advisory Opinion delivered in *Legality of the Threat or Use of Nuclear Weapons*. She pointed out that “The principle of proportionality . . . is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.” (§ 20, at p. 587).

261. Intentionally directing attacks against the civilian population as such, or against civilians not taking direct part in hostilities, is a serious violation of international humanitarian law and amounts to a war crime.¹²⁸ The components of this war crime are identical whether the acts take place in the course of an international or non-international armed conflict.¹²⁹
262. The Commission’s factual findings in relation to attacks on civilians in Darfur must be analysed from the perspective of the prohibition of indiscriminate attacks on civilians. In this regard, it is necessary to consider whether: i) precautions were taken to ensure the protection of civilians and civilian objects, and ii) the attacks were proportionate to the military objectives.
263. As noted above, one justification given for the attacks by Government of the Sudan armed forces and Janjaweed on villages is that rebels were present at the time and had used the villages as a base from which to launch attacks—or, at the very least, that villagers were providing support to the rebels in their insurgency activities. Government officials therefore suggested that the villagers had lost their legal status as protected persons.
264. The ICTY has held that “a wide definition of civilian population . . . is justified,” in the context of crimes against humanity, and that “the presence of those actively involved in the conflict should not prevent the characterization

¹²⁸ Article 8(2)(e)(i), ICC Statute.

¹²⁹ They include:

- the perpetrator directing an attack;
- the object of the attack being a civilian population or individual civilians not taking direct part in hostilities;
- the perpetrator intending the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack;

of a population as civilian . . ."¹³⁰ In another case, the ICTY again considered the different elements of an attack directed against a civilian population as part of the definition of crimes against humanity. According to a Trial Chamber, 'as a minimum, the perpetrator must have known or considered the possibility that the victim of his crime was a civilian' and stressed that 'in case of doubt as to whether a person is a civilian, that person shall be considered to be civilian'.¹³¹ Similarly, the ICTR held that "[w]here there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character."¹³² Drawing on this reasoning, it is clear that the mere presence of a member or members of rebel forces in a village would not deprive the rest of the village population of its civilian character.

265. Furthermore, as pointed out above, and contrary to assertions made to the Commission by various Government officials, it is apparent from consistent accounts of reliable eyewitnesses that no precautions have ever been taken by the military authorities to spare civilians when launching armed attacks on villages. No eyewitnesses reported that leaflets had been launched, or that warnings had been given on the radio or through the tribal chiefs, or that aircraft had flown low over villages to warn civilians of an imminent attack. Moreover, the mode and pattern of aerial flights preceding attacks can in no way be construed as warning signals, as these were clearly part of the attack. Even the Government has not used this as a defence of its position on aerial attacks or support of ground forces during attacks.
266. The issue of proportionality did obviously not arise when no armed groups were present in the village, as the attack exclusively targeted civilians. However, whenever there might have been any armed elements present, the attack on a village would not be proportionate, as in most cases the whole village was destroyed or burned down and civilians, if not killed or wounded, would all be compelled to flee the village to avoid further harm. The civilian losses resulting from the military action would therefore be

the conduct taking place in the context of and being associated with a non-international armed conflict; and

the perpetrator being aware of factual circumstances that established the existence of an armed conflict. The mental element of an attack on a civilian population is inferred where 'the civilian character of the objects damaged was known or should have been known', and 'the attack was wilfully directed at civilian objects'. Article 8(2)(e)(i), ICC Statute. See also ICTY, Review of the Indictment, *The Prosecutor v Milan Martić*, IT-95-11-R61, 108 ILR 39 at 45, which states "there exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterization as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed . . . the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law."

¹³⁰ *Tadić*, op. cit., Trial Chamber II Judgement of 7 May 1997, para. 643.

¹³¹ Kunarac et al, case Nos. IT-96-23-T and IT-96-23/1-T, Judgement of 22 February 2001, para 435.

¹³² *Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Decision of 2 September 1998, para. 582.

patently excessive in relation to the expected military advantage of killing rebels or putting them *hors de combat*.

267. *Concluding observations.* It is apparent from the Commission's factual findings that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present or at least some rebels were hiding there, or that there were persons supporting rebels—an assertion that finds little support from the material and information collected by the Commission—the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack.¹³³ The impact of the attacks shows that the military force used was manifestly disproportionate to any threat posed by the rebels. In fact, attacks were most often intentionally directed against civilians and civilian objects. Moreover, the manner in which many attacks were conducted (at dawn, preceded by the sudden hovering of helicopter gun ships and often bombing) demonstrates that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. From the viewpoint of international criminal law these violations of international humanitarian law no doubt constitute large-scale war crimes.
268. From the Commission's findings it is clear that the rebels are responsible for attacks on civilians, which constitute war crimes. In general, the Commission has found no evidence that attacks by rebels on civilians have been widespread, or that rebel attacks have systematically targeted the civilian population.

(ii.) Killing of civilians

(a.) Factual findings

1. Killing by Government forces and/or militias

269. The Commission has had access to a vast number of reports from various sources which document extensive killings of civilians throughout Darfur, from the beginning of 2003 up to the time of publication of this report. These reports note that the great majority of the killings were committed by people who witnesses described as Janjaweed, in most cases uniformed and on horses or camels. It is reported that the killings are generally committed during attacks on villages or hamlets. The reports further note that the killings are often the result of gunfire. Witness testimonies reflected in these reports describe attackers with Kalashnikovs and other automatic weapons

¹³³ Statements to the contrary were made to members of the Commission by some Government officials, however in spite of repeated requests by the Commission to provide evidence of warnings these statements were never corroborated.

shooting either indiscriminately or targeting specific people, usually men of military age. The use of other weapons, such as swords, has also been noted, albeit less frequently. In some of these cases, killings are reported to have occurred on a massive scale with hundreds of civilians being killed in the course of an attack. Incidents of confinement of the civilian population, accompanied by arbitrary executions have also been reported, as well as civilian deaths as a result of indiscriminate air attacks by Government forces. The reports note that killings have continued during displacement in camps at the hand of the militias surrounding the camps, and that some IDPs have also been the victims of indiscriminate police shooting inside camps, in response to alleged rebel presence.

270. The description of killings found in these reports corresponds to the findings made by the Commission during its missions to the Sudan, through credible witness testimonies and investigations. It is impossible to describe in this report all the incidents of killings which the Commission has documented. However, a few cases are presented here which are characteristic of the pattern of killings noted by the Commission,
271. The Commission found that while all parties involved in the conflict have committed crimes against the civilian population, the Government of the Sudan and the Janjaweed bear responsibility for an overwhelming majority of the murders¹³⁴ of civilians committed during the conflict in Darfur. Furthermore, most of the civilians killed at the hands of the Government or the militias are, in a strikingly consistent manner, from the same tribes, namely Fur, Massalit, Zaghawa and, less frequently, other African tribes, in particular the Jebel and the Aranga in West Darfur.

a. Killing in joint attacks by Government forces and Janjaweed

272. As an example of a case of mass killing of civilians documented by the Commission, the attack on Surra, a village with a population of over 1700, east of Zalingi, South Darfur, in January 2004, is revealing. Witnesses interviewed in separate groups gave a very credible, detailed and consistent account of the attack, in which more than 250 persons were killed, including women and a large number of children. An additional 30 people are missing. The Janjaweed

¹³⁴ The Commission uses 'murder' and 'killing' interchangeably. 'Wilful killing' is the language used in the grave breaches provisions of the Geneva Conventions of 1949 (respectively Articles 50, 51, 130 and 147) and reproduced in the war crimes provisions (grave breaches) in the various statutes of international criminal tribunals (see e.g. Article 2 of the ICTY Statute; Art. 8(2)(a)(i) of the ICC Statute). 'Murder' is used in Common Article 3 of the Geneva Conventions and in the provisions of the various statutes of the international tribunals referring to war crimes other than grave breaches (serious violations of the laws and customs of war in ICTY; violations of Common Article 3 for ICC and ICTR) and crimes against humanity (see Art. 7 and 8(2)(c)(i) of the ICC Statute; Art. 3 and 4 of ICTR Statute, Article 3 of ICTY Statute). In short, the ICTY has held that the elements of the crime for murder and wilful killing are similar: *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 233, confirmed by the Appeals Chamber on 17 December 2004, at §. 38, *Delalić*, §. 422.

and Government forces attacked jointly in the early hours of the morning. The military fired mortars at unarmed civilians. The Janjaweed were wearing camouflage military uniform and were shooting with rifles and machine guns. They entered the homes and killed the men. They gathered the women in the mosque. There were around ten men hidden with the women. They found those men and killed them inside the mosque. They forced women to take off their *maxi* (large piece of clothing covering the entire body) and if they found that they were holding their young sons under them, they would kill the boys. The survivors fled the village and did not bury their dead.

273. The Commission was able to find various elements to corroborate witness accounts and confirm the occurrence of mass killings of civilians by Government forces and militias. For instance, the Commission visited Kailek, a village in South Darfur mainly populated by people belonging to the Fur tribe, and confirmed what eyewitnesses had told the Commission. This case illustrates not only the occurrence of mass killings of civilians, but also of wrongful confinement accompanied by summary executions, rape and other abuses. During the first attack described in the previous section, 9 villages around Shataya, a town in the vicinity, were destroyed and 85 people were killed, including five women and three children. After the attack, the whole population of the area went to Kailek. There were still Janjaweed present in the surrounding villages, and people who attempted to return to these villages came under attack and some were killed. The Commission found elements to corroborate reports according to which 28 unarmed men who attempted to surrender themselves at the Kailek police station were all shot—only one man survived. In addition, 17 policemen were also killed in this attack, all of whom belonged to African tribes.
274. A second attack occurred in March 2004. Government forces and Janjaweed attacked at around 15h00, supported by aircraft and military vehicles. Again, villagers fled west to the mountains. Janjaweed on horses and camels commenced hunting the villagers down, while the military forces remained at the foot of the mountain. They shelled parts of the mountains with mortars, and machine-gunned people as well. People were shot when, suffering from thirst, they were forced to leave their hiding places to go to water points. There are consistent reports that some people who were captured and some of those who surrendered to the Janjaweed were summarily shot and killed. One woman claimed to have lost 17 family members on the mountain. Her sister and her child were shot by a Janjaweed at close range. People who surrendered or returned to Kailek were confined to a small open area against their will for a long period of time (possibly over 50 days). Many people were subjected to the most horrific treatment, and many were summarily executed. Men who were in confinement in Kailek were called out and shot in front of everyone or alternatively taken away and shot. Local community leaders in particular suffered this fate. There are reports of people being thrown on to fires to burn to death. There are reports that people were partially skinned or otherwise injured and left to die.
275. The case of Kailek is not isolated. It is similar to other incidents in which similar patterns are reported. For example, after months of consistent attacks of

villages in the area, many persons gathered in Deleig after having fled their villages. In March 2004, Janjaweed and Government forces surrounded the town of Deleig, and then went from house to house looking for specific individuals. Many men were arrested and taken to the police station. They were separated into different groups and some were transported in a truck, allegedly to the Garsila area. The truck would come back empty and leave again with a new group of men. Most of those taken away were executed. According to highly reliable eyewitnesses, over 120 men were killed (reportedly mainly intellectuals and leaders). This was another instance of planned and organized joint attack by the Government forces and the Janjaweed, during which mass killings and summary executions were committed. The most recent such incident, although at a relatively smaller scale, occurred in Adwa in November 2004. The Commission does not consider it a coincidence that such brutal forms of killings have largely been committed against the Fur population.

276. The Commission considers that almost all of the hundreds of attacks that were conducted in Darfur by Janjaweed and Government forces involved the killing of civilians.

b. Killing in attacks by Janjaweed

277. Multiple killings have been committed by the Janjaweed during attacks. Several incidents of this nature were verified by the Commission. One attack in Molli in West Darfur in April 2003 left 64 people dead including a seven year old girl. The dead are buried in 8 multiple graves in the market area of the village. A significant fact noted by the Commission was that the incident was reported to the police and seven people were arrested, detained and eventually released three months later. The village of Nurei close to the town of Mornei in West Darfur was attacked by Janjaweed and the Government forces in December 2003. This attack was supported by helicopter cover. 67 civilians were killed in deliberate and indiscriminate shooting by the assailants. All the houses in the village were burnt. Bodies of the victims were buried in mass graves near the village. In another case, the Janjaweed attacked Mallaga village in October 2004. Eighteen men were killed and four men and two women injured. The Commission verified the presence of two grave sites in the village—one said to contain the bodies of two men, and another with the bodies of seven men, all of whom died during the attack. In El Geneina the team also visited one of the areas used as a public cemetery, where according to witnesses nine victims of the attack on Mallaga were buried in a multiple grave, after the villagers brought the bodies to the town's hospital.
278. The Commission also notes that Janjaweed have, on a number of occasions, specifically targeted and killed children including in Kailek and Surra referred to above. The Commission received many reports of random and/or targeted killing of children, sometimes in horrific circumstances such as by burning or mutilation.
279. Several incidents of this nature were verified by the Commission. In short, the Commission has collected very substantial material and testimony which tend to confirm, in the context of attacks on villages, the killing of *thousands* of civilians.

c. Killing as a result of air bombardment

280. Other cases of killings are directly attributable to the armed forces of the Government of the Sudan, and especially killings caused by indiscriminate air attacks. For instance, the village of Amika Sara, South Darfur was reportedly bombed by helicopter gun-ships, in an attack supported by Antonov aircraft and with ground support from Janjaweed, in October 2004. The site was visited on three occasions by the Commission. The evidence found was consistent with the testimony given by witnesses, according to whom 17 civilians were killed. The remains of rockets fired from helicopters were clearly identified. Crater analysis suggests that the helicopter attacks involved either multiple passes or multiple aircraft, or both. The Commission verified the presence of fresh graves in the area.
281. A further example of many such attacks documented by the Commission is the attack on Habila town in West Darfur in August 2003 when six bombs were dropped by an Antonov aircraft on the town and the market, killing 30 civilians. The Commission's investigators verified witness testimonies, inspected sites showing evidence of bombardment, and saw graves where 27 of the 30 victims are buried. Habila is mainly populated by the Massalit tribe. The Commission found no evidence that there was any rebel activity or structures in the vicinity that could have been the target of this attack. The Government acknowledged the attack and offered to compensate the victims.
282. In another case investigated by the Commission and referred to in the previous section, Antonov aircraft bombed Anka village and the surroundings, in February 2004. After the bombing, Janjaweed attacked, destroying houses and looting property. As a result of the attack, fifteen people were killed by shrapnel injury while others were wounded, houses were burned and property was lost. Some of the survivors now have physical disabilities as a result of their injuries.
283. Based on its investigations and the pattern of air attacks which it has established, the Commission is of the view that the military bears responsibility for a very large number of indiscriminate air attacks which resulted in the death of numerous civilians.

d. Killing following displacement

284. Civilians have also been killed after they have reached IDP sites following displacement. On some occasions, they have been killed as they ventured out of the camp, either to go back to their village or for any other reason. For instance, different witnesses told the Commission of the recent killing of three persons who had left an IDP camp in Kass to go and see their nearby village. The perpetrators were unidentified, but the people interviewed said they were "probably Janjaweed." They said that the militias stayed around the camps and the village in case anyone tried to return. In another instance in Kalma camp in South Darfur in November 2004, at a time when the Commission was present in Nyala, a number of IDPs were reportedly killed and injured when police shot into the camp, allegedly in response to attacks from rebels hiding in the camp.

2. *Killing by Rebel Groups*

a. Killing of civilians

285. The Commission also has found that rebels have killed civilians, although the incidents and number of deaths have been few.
286. The Commission documented some rebel attacks and verified witness testimonies with thorough investigations in the field. For instance, the Commission has investigated a JEM attack on the town of Kulbus, West Darfur, on 4 October 2003, and on 25 and 26 December 2003. During the first attack in Kulbus 42 soldiers and 17 male civilians including one child were killed. The Commission's forensic experts have been able to verify that some of the military were buried in the trenches which existed around the military camp, and all civilians were buried in multiple graves in the town cemetery. In a second attack on 25 and 26 December 28 Government soldiers were killed, as well as four male civilians. Arguably, the town of Kulbus was a military target, evidenced by the military camp there. It would need further investigation to determine whether civilians were caught in cross-fire, or whether they were attacked in an indiscriminate or disproportionate manner, or killed wilfully.
287. These attacks were preceded by an attack described to the Commission by some eyewitnesses, where members of the nomadic Rezeigat tribe were attacked while in the Kulbus area by members of the SLA and JEM. The attackers killed forty eight persons including women and children and stole property and livestock from the market and then destroyed it. The victims were buried many days after the attack in areas surrounding Kulbus.
288. The Commission has been unable to confirm reports it has received, especially from the Government, concerning abductions, targeted killings and executions of civilians carried out by the rebels primarily because the rebels suspect them of being Government spies. While the Commission does not exclude that this may have happened, it has not been able to verify whether it had in fact occurred.

b. Killing of humanitarian workers

289. The Commission was provided with a number of reports of incidents where humanitarian workers were the victims of attacks. Although the Commission was not in a position to verify the identity of perpetrators itself in the course of its work, credible sources attributed most of these instances to the different groups of rebels. For instance, the new rebel movement NMRD (National Movement for Reform and Development) is accused of an incident that occurred in October 2004 in Umbarro, North Darfur, where two international workers were killed in a mine incident.
290. In another incident involving the same international humanitarian organization, two of its staff members working with a mobile health clinic were brutally killed while travelling in a clearly marked humanitarian convoy on the main road between Mershing and Duma in South Darfur. The circumstances of the killings remain unclear.

(b.) Legal Appraisal

291. As stated above murder contravenes the provisions of the International Covenant on Civil and Political Rights and of the African Charter on Human and People's Rights, which protect the right to life and to not be "arbitrarily deprived of his life."¹³⁵ As for international humanitarian law, murder of civilians who do not take active part in hostilities in an internal armed conflict, is prohibited both by common Article 3 of the 1949 Geneva Conventions and by the corresponding rule of customary international law, as codified in Article 4(2)(a) of Additional Protocol II. It is also criminalized either as a war crime or, depending upon the circumstances, as a crime against humanity, as proved by case law and by the Statutes of the various international tribunals. It is crucial to stress again at this point that when considering if the murder of civilians amounts to a war crime or crime against humanity, the presence of non-civilians does not deprive a population of its civilian character.¹³⁶ Therefore, even if it were proved that rebels were present in a village under attack, or that they generally used the civilian population as a 'shield', nothing would justify the murder of civilians who do not take part in the hostilities.
292. A particular feature of the conflict in Darfur should be stressed. Although in certain instances victims of attacks have willingly admitted having been armed, it is important to recall that most tribes in Darfur possess weapons, which are often duly licensed, to defend their land and cattle. Even if it were the case that the civilians attacked possessed weapons, this would not necessarily be an indication that they were rebels, hence lawful targets of attack, or otherwise taking active part in the hostilities. In addition, it should be noted that the Government of the Sudan did not claim to have found weapons in the villages that were attacked. Furthermore, many attacks occurred at times when civilians were asleep, or praying, and were then not in a position to "take direct part in the hostilities." The mere presence of arms in a village is not sufficient to deprive civilians of their protected status as such.
293. In light of the above factual findings, the Commission considers that there is a consistent and reliable body of material which tends to show that numerous murders of civilians not taking part in the hostilities were committed

¹³⁵ Article 6(1)ICCPR, Article 4 of the African Charter. As mentioned above (§.), the UN Human Rights Committee held that this right is laid down in international norms that are peremptory in nature, or norms of jus cogens (General Comment no.29, at §11). See CCPR/C/21/Rev.1/Add.11, 31 August 2001.

¹³⁶ *Akayesu*, (ICTR Trial Chamber), September 2, 1998, para. 582: "Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character." See also *Rutaganda*, (ICTR Trial Chamber), December 6, 1999, para. 72; *Musema*, (ICTR Trial Chamber), January 27, 2000, para. 207. See also *Kayishema and Ruzindana*, (ICTR Trial Chamber), May 21, 1999, para. 128: "[T]he targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population." See also *Bagilishema*, (ICTR Trial Chamber), June 7, 2001, para. 79; *Semanza*, (ICTR Trial Chamber), May 15, 2003, para. 330.

both by the Government of the Sudan and the Janjaweed. It is undeniable that mass killing occurred in Darfur and that the killings were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population. The large number of killings, the apparent pattern of killing described above, including the targeting of persons belonging to African tribes and the participation of officials or authorities are amongst the factors that lead the Commission to the conclusion that killings were conducted in both a widespread and systematic manner. The mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity.

294. Considering the limits of its inherent functions, the Commission has been unable to assert with certainty the number of civilian victims in Darfur. The Commission leaves it to the competent court that will pronounce on these alleged crimes to determine whether the mass killings may amount to extermination as a crime against humanity.¹³⁷
295. In addition, given the discriminatory character on political grounds of the systematic and widespread murder of civilians, these acts may very well amount to the crime of *persecution* as a crime against humanity. In *Zoran Kupreškić and others*, the ICTY Trial Chamber defined persecution as “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.”¹³⁸ In Article 7 (2) (g) of the ICC statute persecution is defined as “The intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” What is important to note here is that persecution can involve the violation of a number of fundamental rights and that it must be committed on discriminatory grounds. The fact that the killings committed by the Government and the Janjaweed appear to have been systematically targeted against the Fur, Massalit, Zaghawa and other

¹³⁷ Murder can amount to extermination as a crime against humanity. Extermination is primarily concerned with the mass destruction of a group of individuals, the emphasis being placed on the scale of the destruction, unlike murder which may comprise a singular incident. Extermination generally involves “the destruction of a numerically significant part of the population concerned.” Although conceptually what differentiates murder and extermination is the element of mass killing involved in the latter, the perpetrator must not necessarily have committed mass killings himself, but must have been involved in the killings of civilians on a large scale. Furthermore, “extermination may be retained when the crime is directed against an entire group of individuals even though no discriminatory intent or intention to destroy the group as such on national, ethnic, racial or religious grounds has been demonstrated; or where the targeted population does not share any common national, ethnical, racial or religious characteristics”. The perpetrator must however have “intended the killing” or was “reckless or grossly negligent as to whether the killing would result,” and was “aware that his act(s) or omission(s) form[] part of a mass killing event Nahimana, Barayagwiza and Ngeze, (ICTR Trial Chamber), December 3, 2003, para. 1061; Kayishema and Ruzindana, (ICTR Trial Chamber), May 21, 1999, note 8 to para. 645 and para. 144; Krstic, (ICTY Trial Chamber), August 2, 2001, para. 500; Vasiljevic, (ICTY Trial Chamber), November 29, 2002, para. 228–229.

¹³⁸ See *Zoran Kupreškić and others*, ICTY Trial Chamber, judgment of 14 January 2000, at § 621..

African tribes on political grounds is indicative of the discriminatory character of the killing and may thus amount to persecution as a crime against humanity.

296. As for the killing of civilians by the rebels, each individual violation must be considered as a very serious war crime. The Commission is, however, unable to conclude that they form part of a 'systematic' or 'widespread' attack against the civilian population.

(iii.) Killing of detained enemy servicemen

(a.) Factual findings

297. Some cases of death in detention were reported to the Commission by all parties, although these incidents are not thought to have occurred on a widespread basis. The Commission itself noted, *inter alia*, the events that occurred in Kailek and Deleig where Government forces and members of militias detained persons who they claimed were rebels hiding as civilians. Based on its substantial body of information on events in both places, the Commission notes, firstly, that very few, if any, of the thousands of people detained in Kailek and Deleij were rebels. Secondly, even if, as the Government alleges, the young men who were killed were indeed members of the rebel groups, their summary execution would contravene international law and the perpetrators should be held responsible for war crimes. As for killing of detained servicemen by the rebels, the Commission has received reports, especially from the Government, concerning executions of detained soldiers carried out by the rebels. Such executions would constitute war crimes, however, the Commission has not received independent information to corroborate reports received.

(b.) Legal Appraisal

298. International humanitarian law prohibits ill-treatment of detained enemy combatants, in particular violence to life and person, including murder of all kinds (see common Article 3(1)(a) of the Geneva Conventions). It also specifically prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (see Article 3(1) (d) of the Geneva Conventions). Wilful killing of a detained combatant amounts to a war crime.

(iv.) Killing of wounded enemy servicemen

(a) Factual findings

299. While there have been allegations of murder of wounded soldiers, very few cases were in fact brought to the attention of the Commission and it was unable to verify these reports.

(b) Legal Appraisal

300. The wilful killing of wounded servicemen is strictly prohibited by international humanitarian law (see Article 23 (b) and (c) of the Hague Regulations and common Article 3 (1)(a) of the Geneva Conventions). It amounts to a war crime.

(v.) Wanton destruction of villages or devastation not justified by military necessity

(a.) Factual findings

1. Destruction by armed forces and Janjaweed

301. The Commission has received and examined a great number of reports which document both the systematic and widespread destruction of entire villages and hamlets in the three states of Darfur. A number of reports have presented satellite imagery clearly documenting this widespread destruction. Some reports estimate that more than 600 villages and hamlets have been completely destroyed, while an additional 100 to 200 villages have been partially destroyed. Other sources, based on Sudanese police reports, indicate that more than 2000 villages were destroyed. As noted above, the destruction of villages has been irrefutably established which is clearly acknowledged by the Government of the Sudan.
302. The Commission examined detailed reports of the destruction of almost 140 villages in the three states of Darfur. While some reports have noted a few incidents of destruction of villages and private property committed by the rebel groups, most of the reports contain witness accounts indicating that the majority of villages were destroyed during attacks by Janjaweed, often under the direction and with the participation and the support of the armed forces of the Government of the Sudan.
303. There are many incidents reported in which Government forces are said to have surrounded villages and stood guard as the Janjaweed burnt and pillaged and committed other atrocities against the population. Many villages are said to have been attacked more than once, until they were completely destroyed.
304. Many reports also note that villages were burnt even after these had been abandoned by the inhabitants who fled to IDP camps in larger urban centres in Darfur, or to neighbouring Chad. This has led many observers to fear that this is a part of the policy executed through the Janjaweed to expel the population from the targeted areas and to prevent the immediate or, possibly, long-term return of the inhabitants. This concern is expressed because the villages reported to have been burnt and destroyed in this manner are almost exclusively inhabited by African tribes, mostly Fur, Masaalit and Zaghawa.
305. Many of the villages were reportedly completely destroyed by deliberate demolition of structures and more frequently by burning down the whole village. Straw-roofs of the traditional circular houses were torched, as well as all other inflammable material, and vegetation inside and in the immediate

vicinity of the village was destroyed by burning. Some of these villages had hundreds of homes that 81 were torched and burnt to the ground. During the attacks Janjaweed are reported to have destroyed utensils, equipment for processing food, water containers and other household items essential for the survival of the inhabitants. Wells were reportedly poisoned by dropping the carcasses of cattle into the wells. In addition, as noted below, the destruction seems to have been consistently combined with looting of personal valuables, cash and, above all, live-stock.

306. The Commission witnessed first-hand the extensive nature of the destruction, and subsequently carried out detailed fact-finding at several sites in all the three states of Darfur to verify and establish acts that resulted in the destruction, the methods employed, the forces responsible and the patterns that indicate the intent behind these acts.
307. The Commission found that the witness testimonies previously reported were in conformity with what was discovered as a result of its own inquiries and investigations. It can be confirmed that most destruction has been caused by the Janjaweed with the support of the Government of the Sudan.
308. The trends and patterns are best illustrated in the case of West Darfur where the widespread destruction is most visible. The Commission found 35 destroyed villages in only four localities (El Geneina, Habila, Kulbus and Wadi Saleh). These are only a small number of the scores that are reported to have been destroyed in the same area and are in addition to the ones that were damaged as a result of aerial strikes by Government forces that the Commission has verified.
309. Of these 13 were destroyed in raids by the Janjaweed and 18 in combined attacks by Government forces and the Janjaweed, who were wearing uniforms similar to those of the military. The manner of destruction of most villages seems to follow a clear systematic pattern. Most of the destruction was carried out by Janjaweed who set entire villages afire and destroyed any private property which was not looted. Often the armed forces of the Government of the Sudan were present, either in aircraft or in vehicles outside the village, but did not, except in a few cases, take part in the actual destruction, unless destruction was caused by aerial bombardment.
310. From the material collected it is evident that the majority of the destroyed or damaged villages belong either to the Masaalit, the Zaghawa, the Fur, or other African tribes. In West Darfur, for instance, out of the 35 completely or partially destroyed villages investigated by the Commission, 31 belonged to African tribes who had clearly been systematically targeted, while the remaining 4 belonged to two Arab tribes who had been attacked by either the JEM or the SLA. This is further illustrated by the fact that most other tribes have not been targeted in this way, if targeted at all. The Commission observed, for instance, that in an area of 50 km between Al Geneina and Masteri inhabited mostly by Arab tribes, no signs of destruction were recorded. Similar patterns have been noted in North and South Darfur in areas where there is a concentration of Zaghawa and Fur populations, whose villages had been targeted.

311. The Commission heard credible accounts showing that the acts of destruction were wanton and deliberate, and that in addition to homes all essential structures and implements for the survival of the population were also destroyed. Oil presses, flour mills, water sources such as wells and pumps, crops and vegetation and almost all household utensils were found scorched or smashed at the sites inspected by the Commission team. The Commission has also noted the destruction of schools, health centres, markets and other civilian objects.
312. Such a pattern of destruction can only be interpreted as having the objective of driving out the population through violence and preventing their return by destroying all means of survival and livelihood. The Commission has also verified that a number of villages previously inhabited by the Fur in South Darfur and Masaalit in West Darfur are now being populated by Arab tribes.
313. The Commission did not find any evidence of military activity by the rebels in the major areas of destruction that could in any way justify the attacks on military grounds.
314. In some instances, such as around Kornoi and Tine in the northern parts of West Darfur and some parts of North Darfur, destruction is mainly linked to aerial bombardment, but has been only partial, with only a few structures destroyed.
315. In conclusion, the Commission finds that there is large-scale destruction of villages in all the three states of Darfur. This destruction has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government forces may not have participated directly in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene are sufficient to make them jointly responsible. The destruction was targeted at the areas of habitation of African tribes, in particular the Fur, Zaghawa and Massalit. There was no military necessity for the destruction and devastation caused as a joint venture by the Janjaweed and the Government forces. The targets of destruction during the attacks under discussion were exclusively civilian objects; and objects indispensable to the survival of civilian population were deliberately and wantonly destroyed.

2. Destruction by rebels

316. In addition, the Commission has recorded incidents in North Darfur in which the SLA is reported to have burnt houses as well as a police station during its attacks on the towns of Tawilah and Korma.
317. The Commission found no information or evidence which would indicate that the rebel groups are responsible for causing widespread destruction. However, there are a few incidents in which they have destroyed houses and buildings in towns and villages. This is particularly notable in the JEM attacks on Kulbus town in West Darfur, and villages in this locality between

October and December 2003. The Commission has heard credible testimony describing the partial destruction of a school, the hospital and the market, deliberately inflicted by the rebel group during the attack on the town. There are also credible accounts of the destruction of at least one village in the locality.

(b.) Legal appraisal

318. Article 11 of the International Covenant on Economic, Social and Cultural Rights provides, *inter alia*, that “the States Parties to the present Covenant recognize the right of everyone to [. . .] adequate food, clothing and housing.”¹³⁹ Furthermore, customary international law prohibits and criminalizes the destruction of property of a hostile party carried out by a belligerent in the course of an international or internal armed conflict, and not justified by military need.
319. It is apparent that the massive destruction of villages by the Government forces and the Janjaweed was not justified by military necessity. Those villages were inhabited by civilians and, if some rebels were living there or taking shelter in some homes, it was not warranted to destroy the whole village by setting it afire. The destruction of so many civilian villages thus amounts to a very serious war crime.
320. In addition to constituting a war crime¹⁴⁰, destruction of property, if part of a systematic or widespread attack on part of the civilian population, may amount to the crime of persecution as a crime against humanity if carried out on discriminatory grounds. However, not all destruction of property *per se* amounts to persecution. It must further be established that the destruction of property will have a detrimental effect on the liberty and livelihood of those people in that area. As an ICTY Trial Chamber held in *Zoran Kupreškić and others*,¹⁴¹ such destruction should be akin to “the same inhumane consequences as a forced transfer or deportation.” Another ICTY Trial Chamber held in *Blaskić* that the “destruction of property must be construed to mean the destruction of towns, villages and other public or private property not justified by military necessity and carried unlawfully, wantonly and discriminatorily.”¹⁴²
321. The destruction of property in Darfur was clearly part of a systematic and widespread attack on the civilian population; it clearly had a detrimental effect on the liberty and livelihood of those people, being deprived of all necessities of life in the villages; and it almost consistently involved the forced displacement of persons. The destruction was clearly carried out “unlawfully and wantonly,” and the fact that the vast majority of villages

¹³⁹ Committee on Economic, Social and Cultural Rights, General Comment no.4 on the right to adequate housing, of 13 December 1991, and General Comment No. 7, on the right to adequate housing (art. 11.1 of the Covenant): Forced evictions, of 20 May 1997.

¹⁴⁰ See, e.g., *Kordić and Cerkez*, (ICTY Trial Chamber), February 26, 2001, §. 346–347.

¹⁴¹ Judgment of 14 January 2000, §. 631 (see also §. 621).

¹⁴² *Blaskić*, Judgment of 3 March 2000, §. 234.

destroyed belonged to African tribes would also indicate that it is carried out “discriminatorily.” In view of these facts, the Commission is led to the conclusion that this destruction may well amount to the crime of persecution, as a crime against humanity.

(vi.) *Forcible transfer of civilian populations*

(a.) *Factual findings*

322. As noted above, the displacement of a very large part of the population of Darfur is a fact beyond dispute. All reports examined by the Commission agree that the displacement has been forced and widespread, affecting more than 1,85 million persons (1,65 million IDPs in Darfur, and more than 200,000 refugees in Chad).¹⁴³ The magnitude of displacement caused at the outset of the crisis is still problematic to determine, as there were practically no assessments or estimates carried out, since there were no humanitarian organizations present in Darfur to conduct such an estimate, nor did the Government put forward figures. Humanitarian access was also seriously hampered until mid-2004 when the Government finally agreed to a more flexible and expeditious procedure for granting access to humanitarian workers. Most reports argue that the displacement has been a major feature and, it would appear, even an objective for some actors during the conflict.
323. Most official United Nations reports note that the number of displaced persons grew quite dramatically over a relatively short period. For instance, as noted above, the Office of the Deputy Special Representative of the United Nations Secretary-General for the Sudan and United Nations Resident and Humanitarian Co-ordinator in its *Humanitarian Profile of November 2004*, noted that the total number of IDPs exceeded 1,65 million persons. However when the United Nations first began to estimate the number of displaced in September 2003, the number was less than 300,000.¹⁴⁴
324. The Commission and its team witnessed ample evidence of the displacement and conducted a great number of interviews with both IDPs in Darfur and refugees in Chad. In South Darfur the teams visited IDPs in Kalma Camp, Otash, Zalingi, Kass and other sites. In North Darfur the teams interviewed IDPs in Abushouk, Zam Zam and Fatoborno camp near El Fashir, as well as IDPs in Kutum. The West Darfur team interviewed refugees across the border in Chad, including in the Bredjing camps, and also spoke to IDPs in Mornei and Masteri.
325. As noted in the sections on attacks, killings and destruction above, the Commission found that most of the internal displacement as well as the displacement to Chad occurred as a direct result of attacks by Janjaweed and/

¹⁴³ Office of UN Deputy Special Representative of the UN Secretary-General for Sudan, & UN Resident and Humanitarian Co-ordinator, *Darfur Humanitarian Profile, No. 8*, November 2004. UNHCR refugee statistics provided by UNHCR Chad.

¹⁴⁴ *Darfur Humanitarian Profile, No. 8*, November 2004, available at <http://www.unsudanig.org>.

or Government forces. Following the destruction of their villages, and also as a result of direct threats and other violations committed by the attackers, the villagers decided to leave their homes to seek security in large urban areas inside Darfur, or across the border in Chad. Others fled out of fear of attacks, since they had received information about atrocities in the vicinity. Practically all of the displaced had been unable to return to their villages due to continued insecurity caused by threats from and presence of Janjaweed. The Commission was able to confirm that in the area between Kulbus and Tina most of the villages were deserted, the original inhabitants having fled to Chad or other areas inside the country. Only a few settlements were still inhabited, but by nomadic herders who were observed to be settled around or in the villages. The presence of these herders was also noticed by the Commission around the otherwise deserted villages around Sirba and Abu Surug in West Darfur. The Commission spoke to some displaced persons who had sought to return but had again faced attacks.

326. A typical account involving displacement and the inability to return due to continued threat from the Janjaweed is represented by the following interview with a refugee, a member of the Masaalit tribe, in Chad, originally from a village in the Masteri area:

"The village was attacked by Government soldiers and Janjaweed in October 2003. It was a Wednesday and fifth or sixth day of Ramadan. Women had gone to fetch water and at about 7 AM I saw people approaching the village. It was Government soldiers and Arabs coming on horses and cars. There was a plane behind these people. There were about 200 people with guns. They were shouting "This is not your land," and were hitting the children with whips. I ran towards my cow and untied it. One of the attackers, who was wearing khaki, saw me from the hillock on which he was standing and shot me. I was wounded in the groin and ran and hid in the cow shed. I came out only after they had left about 15–20 minutes later. People were fleeing from the village. Some people carried me with them to Masteri, where I was treated in the hospital for my injury. I was later told that my father and younger brother had been killed. Four other people were also killed. I was also told that the soldiers and Janjaweed had looted all the cattle and livestock. 15 days later some people went back to the village, but the Arabs were still around the village. If they saw anyone they whipped the women and killed the men. We first stayed near an IDP Camp in Masteri, and after three months I crossed over to Chad. There were people from 20 villages in the place where we stayed before coming to the Sudan."

327. The Commission also found that, following displacement, the IDPs who remained inside Darfur were still faced with a number of threats and largely confined to remain inside the camps or urban areas, since venturing outside would involve risks of attacks and other violations, in particular rape, as described below.
328. With regard to specific patterns in the displacement, the Commission notes that it appears that one of the objectives of the displacement was linked to the counter-insurgency policy of the Government, namely to remove the actual or potential support base of the rebels. The displaced population

belongs predominantly to the three tribes known to make up the majority in the rebel movements, namely the Masaalit, the Zaghawa and the Fur, who appear to have been systematically targeted and forced off their lands. The areas of origin of the displaced coincide with the traditional homelands of the three tribes, while it is also apparent that other tribes have practically not been affected at all.

329. At the same time, it seems very possible that the Janjaweed, who are composed of tribes traditionally opposing the three displaced tribes, also benefited from this displacement as they would gain access to land. The Commission found evidence indicating that Arab tribes had begun to settle in areas previously inhabited by the displaced, thus further preventing an eventual return of the displaced.

(b) Legal Appraisal

330. Under Article 12 of the International Covenant on Civil and Political Rights "Everyone lawfully within the territory of a State shall, within that territory, have the [. . .] freedom to choose his residence." This provision thus protects freedom of movement and the right *not to be displaced arbitrarily*. The Human Rights Committee has clearly enunciated this right in its General Comment No. 27.¹⁴⁵ On several occasions the United Nations Committee on Economic, Social and Cultural Rights has stated that forced evictions are *prima facie* incompatible with the requirements of the Covenant on Economic, Social and Cultural Rights.¹⁴⁶
331. International customary law prohibits the forcible transfer of civilian populations both in time of peace and in time of war. As clarified in Article 7 (2) (d) of the Statute of the International Criminal Court, which may be held to codify customary international law on the matter, "deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law." The forced dislodgement of civilians from the area where they traditionally and legally live, resulting from unlawful indiscriminate attacks on their dwellings and the scorching of their villages, falls within the scope of the prohibition at issue.
332. Given the systematic and widespread character of the forced displacement of persons in Darfur, the Commission finds that such action may well amount to a crime against humanity. The requisite subjective element (awareness of the systematic nature of the forced displacement) would be inherent in the fact that such displacement clearly amounted to a Government policy consistently pursued by the relevant Government authorities and the Janjaweed. Furthermore, given the discriminatory character of the

¹⁴⁵ See Human Rights Committee, General Comment No. 27 of 2 November 1999, UN Doc CCPR/C/21/Rev.1/Add.9.

¹⁴⁶ General Comment No. 7, on the right to adequate housing (art. 11.1 of the Covenant): Forced evictions, of 20 May 1997.

displacement, these actions would amount to the crime of persecution as a crime against humanity.

(vii.) Rape and other forms of sexual violence

(a.) Factual findings

333. Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called "slaves" or "Tora Bora."
334. The following patterns have been reported: First, deliberate aggressions against women and girls, including gang rapes, occurred during the attacks on the villages. Second, women and girls were abducted, held in confinement for several days and repeatedly raped during that time. Third, rape and other forms of sexual violence continued during flight and further displacement, including when women left towns and IDP sites to collect wood or water. In certain areas, rapes also occurred inside towns. Some women and girls became pregnant as a result of rape.
335. In most of the cases, the involvement of Janjaweed was reported. In many cases, the involvement of soldiers was also alleged. There were few cases reported of rebels committing rape and sexual violence.
336. In general, the findings of the Commission confirmed the above reported patterns. However, the Commission considers that it is likely that many cases went unreported due to the sensitivity of the issue and the stigma associated with rape. On their part, the authorities failed to address the allegations of rape adequately or effectively.

1. Rape and other forms of sexual violence committed by the Janjaweed and/or Government soldiers

a. Rape and other forms of sexual violence during attacks on villages

337. According to the information reported by various organizations, cases of rape and sexual violence took place during attacks on villages. In South Darfur, during the two month period from August to September 2004, out of 120 victims of rape treated by medical professionals, at least 100 cases occurred during attacks on the victim's villages. In a survey conducted in the Mornei camp in West Darfur, medical teams treated around 20 victims of sexual violence from April to June 2004. Most of the cases reportedly occurred during attacks on villages. Further cases of rape were reported during the Government and Janjaweed attacks on Tawila and its surrounding villages during the first half of 2004. During March 2004 attacks by the Government troops and Janjaweed on Korma, North Darfur, more than 20 women and young girls were reportedly raped. Further rapes of women

were reported during attacks around Miski, Disa and Um Baru in North Darfur; Azerni, Kornoi, Nertete, and Mukjar in West Darfur. It has been also reported that 18 women were raped during the attack on Adwa, South Darfur, at the beginning of December 2004. There are reports that women and girls continue to be subject to sexual violence during attacks on their villages, including the report of a recent attack on Hamada on 13 January 2005 in which women were subjected to rape.

338. The findings of the Commission confirm that rape and sexual abuse were perpetrated during attacks by Janjaweed and soldiers. This included the joint attacks by Government soldiers and Janjaweed attacks on Dobo, North Darfur, around March 2004; Badi, North Darfur, around February 2004; and Adwa, South Darfur, in December 2004. It further includes attacks by soldiers on Kalokitting village, South Darfur and on villages in the Wadi Saleh area, West Darfur, around August 2004, as well as attacks by Janjaweed on Mongue, North Darfur, around August 2004; Gukor, West Darfur at the end of 2004; Kolonga, West Darfur, around March 2004; Goz Badeen, West Darfur, around August 2003; Um Naima, West Darfur, in July 2003; and Naba-gai, South Darfur, around March 2004. The Commission interviewed several victims and eye-witnesses who confirmed that during the attacks on Tawila and its surrounding villages in North Darfur, in February and March 2004, rape and other forms of sexual violence committed by Janjaweed were prevalent. The Commission spoke with several victims and eye-witnesses, and conducted on-site examinations which confirmed that many girls were raped by Janjaweed during the attack on Tawila boarding school. The Commission also found that women were gang-raped in public following the joint attack by Government soldiers and Janjaweed on Kanjew village, West Darfur, in January 2004. In another case, the Commission found that the Janjaweed raped five girls in public during the attack on Abdeika, West Darfur, in October 2003.

Case Study: Attack on a school in Tawila, North Darfur

339. One of the victims of rape during the attack on a boarding school in February 2004, a young girl, told the Commission that:

At about 6:00 in the morning, a large number of Janjaweed attacked the school. She knew that they were Janjaweed because of their "red skin," a term she used for Arabs. They were wearing camouflage Government uniforms. They arrived in a pickup truck of the same colour as the uniforms they were wearing. On the day before, she noticed that the Government soldiers had moved in position to surround the school. When they attacked the boarding house, they pointed their guns at the girls and forced them to strip naked, took their money, valuables and all of their bedding. There were around 110 girls at the boarding school. All the events occurred in the sleeping quarters of the school.

The victim was taken from the group, blindfolded, pushed down to the ground on her back and raped. She was held by her arms and legs. Her legs were forced and held apart. She was raped twice. She confirmed that penetration occurred. The rape lasted for about one hour. Nothing was said by the perpetrators during

the rape. She heard other girls screaming and thought that they were also being raped. After the rape, the Janjaweed started burning and looting. (She confirmed the presence of the military in the area, as she had seen military helicopters used by the army on the same day.)

The victim became pregnant as a result of this rape and later gave birth to a child.

Case Study: Attack on Terga, West Darfur

340. The Commission interviewed another victim who provided information about multiple rapes of women during an attack on Terga, West Darfur. This was how she described the attack and what followed:

The village of Terga was attacked in January 2003. A plane bombed the village and then about 40 cars and men on horses arrived. They covered the entire area around Terga. The attackers in the cars and on the horses were shooting the villagers. They were stealing from the houses. Four young boys were executed in front of the villagers. The attack was conducted mainly by the military. The Arab people did the stealing. Soldiers also committed rapes together with the Janjaweed.

When the attack occurred, the women ran to a *wadi*, where the army surrounded them. The victim stated that she knew 19 of the women who were raped but that there were many more. She believed there were around 50 in total. The young girls were raped first. The victim was raped by nine men. Other women were also raped by many men. The women were kept for six days at the wadi.

b. Abductions and sexual slavery

341. Other sources reported that women and girls were abducted, held in confinement for several days and repeatedly raped by Janjaweed and soldiers in villages under attack, military camps and hideouts. Further, torture was reportedly used to prevent women from escaping. In March 2004, Janjaweed and 150 soldiers reportedly abducted and raped 16 young girls in Kutum, North Darfur. During the attacks on Tawila and its surrounding villages in North Darfur in February 2004, around 35 female students were allegedly abducted and raped by Janjaweed. Further abductions of women were reported in the area surrounding El Geneina, West Darfur. Alarming reports were received of mass rape and sexual violence against women and girls who were confined in Mukjar, West Darfur and Kailek, South Darfur. Additional abductions and rape of women were reported, amongst others, in the surroundings of Disa and Silea in West Darfur.
342. The Commission's findings confirmed the above reported pattern. For instance, the Commission found that women who went to market or were in search of water in Tarne, North Darfur, were abducted, held for two to three days and raped by members of the military around March 2003. Notably, the Government of Sudan had established a large military camp in the vicinity. During the Janjaweed attack on Mengarassa village, West

Darfur, in November 2003, twenty girls were abducted and taken to the 'Ammar' camp. The Commission further found that twenty-one women were abducted during the joint Government armed forces and Janjaweed attack on Kanjew, West Darfur, in January 2004. The women were held for three months by Janjaweed and some of them became pregnant as a result of rape during their confinement. During the attack on Mallaga village, West Darfur, in October 2004, the Janjaweed abducted four girls, one of them only twelve years old. The girls were held for three days, raped and then released. Women were also abducted and raped in three Janjaweed camps following the attacks on Korma, North Darfur, in March 2003. The Commission also confirmed that following the attack on Tawila in February 2004 a group of around 30 female students was abducted by Janjaweed and held in an encampment where they were repeatedly raped. Several other women from villages surrounding Tawila were also brought to this camp by the Janjaweed after their abduction following attacks on their villages.

Case study: Kailek, South Darfur

343. The Commission interviewed several eyewitnesses who confirmed that following the joint attacks by Government soldiers and Janjaweed in the area, up to 30,000 people were confined in Kailek, South Darfur, for about 50 days. Women and children were separated from the men, confined in an area around the Mosque, and later taken away by their captors to be raped. They were subjected to gang rapes which lasted for protracted periods of time. Girls as young as 10 years old were raped.
344. One of the female witnesses described the terror of confinement in the area designated by captors for women and children in Kailek as follows:

"We stayed in one place, we were not allowed to move around. The old women were allowed to go and get water, and also to go and get food. We were forced to urinate in front of everybody. We were afraid to use the toilet at night because we were surrounded by the attackers, and they were on the look-out for women to rape.

"After being raped, some of the women did not have their clothes returned to them and they were forced to remain naked. An independent source, who witnessed the situation in Kailek told the Commission: "There were more than 80 cases of rape reported to us by the women and children kept in the walled area. We also found four women with no clothes. They covered themselves with a grass mat and were imploring us not to remove it. They said that if they needed water or food, one of them had to borrow clothes from the other women to go and fetch water or food." Anyone who attempted to assist the victims was either beaten or killed. On one occasion, a husband attempted to assist his wife. He was so severely beaten that he is now permanently paralysed and is in Khartoum hospital. These testimonies are fully corroborated by the entire body of material collected by the Commission, including information obtained through independent observers who witnessed the situation of the women in Kailek.

Case study: Wadi Tina, North Darfur

345. The Commission interviewed a victim who described how she and her six sisters were abducted and held in confinement at the Janjaweed camp in Wadi Tina, after the attack on Tawila and the surrounding villages. The victim, who has been raped 14 times over the period of one week provided the following information:

At about 6h00 in the morning on 7 January 2003, she was at her home in the village of Tarna. Around 3,000 Janjaweed riding horses and camels attacked the village. Some of them were in vehicles. Some were wearing khaki uniforms and some were wearing civilian clothing with white scarves on their heads. There were around 50 Land Cruisers and pick-up vehicles. All of the vehicles had guns on them. The men on the vehicles were wearing army uniforms. They were wearing the same uniforms as the Janjaweed were wearing. They were soldiers of the Sudanese army.

The victim saw women were being taken, people being killed, cattle being stolen, and food being burnt. She further described the following: "Ten Janjaweed came into my house. They took me and my six sisters who were 15, 16, 17, 19, 20 and 24 years old. They said 'why are you staying here, you slaves.' We did not reply. They were armed and all of them were pointing their guns at us. While they were in our house, they shot my two brothers. They took us outside and beat us with the leather straps which they use to control the camels. The beating lasted for 20 minutes.

After being beaten, we were taken to Wadi Tina. They made us walk while they rode their camels. It took us three hours to get there. During this time they beat us and threatened to kill us. When we arrived at Wadi Tina, I saw at least 95 women there. We were left in the Wadi with a large group of women and were guarded by at least 100 armed Janjaweed. All the women were naked. Soon after our arrival we were forced at gun point to take off our clothing.

Around 8h00 in the morning on the second day at the Wadi, I was raped for the first time. A very large group of Janjaweed arrived at the Wadi. They selected a woman each and raped them. Over a period of a week, I was raped 14 times by different Janjaweed. I told them to stop. They said 'you are women of Tora Bora and we will not stop this.' We were called slaves and frequently beaten with leather straps, punched and slapped. I feared for my life if I do not have sex with them. We were humiliated in front of other women and were forced to have sex in front of them. Other Janjaweed were watching"

After a week, she was released with four other girls and went back to Tarna village. She has not seen her sisters since. She did not know the identity of any other women at the Wadi but stated that three women died there as a result of being raped. The victim did not know the identity of the perpetrators.

c. Rape and other forms of sexual violence during flight and further displacement

- 346 Rape and other forms of sexual abuse were widely reported to continue during flight and further displacement, including outside as well as inside

of various IDP sites. The impact of the violence committed outside the IDP sites is exacerbated by the fact that women and their families depended on the collection of firewood for their livelihood and survival. In most of the cases, it was the women and girls who went outside the camps to search for firewood and water, since they had a better chance to survive attacks than the men and boys who risked being killed. According to one report, a family from Magarsa, West Darfur, abandoned their house in February 2004 because of the conflict. The father of the family stated that during the attempt to flee from their home, they had encountered six Arab men who raped his 25 year old daughter in front of him, his wife and the young children. He was unable to defend his daughter as the men threatened him with a weapon. According to another report, two women were reportedly raped in the IDP camp in Kassab, North Darfur, in June 2004. In April 2004, a group of 40 IDP women went to collect wood outside of Mukjar, West Darfur and was reportedly attacked by six armed Janjaweed. Some women were badly beaten and at least one woman was raped by four Janjaweed. During the first week of July 2004, a medical team in Mukjar treated 15 women for serious injuries sustained in eight separate incidents. In two of these incidents, beatings were followed by rape. On 22 July 2004, around thirteen women were reportedly raped by Janjaweed when searching for firewood around the IDP camp near Kass, South Darfur. In July 2004, around 20 women were reportedly raped by Janjaweed when searching for firewood around the Sisi camp, West Darfur. Further rapes of women venturing outside IDPs locations, such as Abu Shouk in North Darfur, Ardamata, Azarni, Garsila, Mornei, Krinding and Riyadh in West Darfur, and Al Jeer, Derej, Kalma, Kass and Otash in South Darfur have been reported.

347. The Commission's findings confirmed that rape and sexual violence continue to be perpetrated against women and girls during flight and in areas of displacement. Rape by Janjaweed and Government soldiers surrounding IDP sites have occurred in sufficient numbers to instil fear of such incidents amongst women and girls, and has led to their virtual confinement inside these sites. The Commission interviewed victims who have been raped and sexually abused outside the Abu Shouk and Zam Zam camps in North Darfur, Habillah, Krinding, Masteri, Mornei and Sisi camps in West Darfur, and Kalma and Derej camps in South Darfur.
348. In one instance, the Commission interviewed two young girls, 12 and 14 years old, who had gone to collect wood with another five children in November 2004 outside the Abu Shouk camp. The soldiers raped the two girls, called the children daughters and sons of "Tora Bora," beat the other children and threatened to kill them. Following the incident, the children went to complain to a nearby military camp and described the perpetrators. The two girls went for a medical examination in the El Fashir hospital and an official complaint was submitted to the local police. The initial response of the local authorities was inadequate. Upon the insistence of the Commission, the local police investigated the incident and informed the Commission that nine suspects were detained and that the case is currently with a prosecutor. Furthermore, the Commission found that there

was a prevalent sense of insecurity among the IDPs in Kabkabiya, North Darfur. In particular, the women and girls collecting firewood feared leaving Kabkabiya as they had been subjected to rape and sexual violence by the Janjaweed. Even if the incidents had been reported to the police, the perpetrators appeared to enjoy impunity and the attacks against women continued. The Commission also interviewed four young women who related two incidents that occurred in June 2004 during which they were detained on the road from the Kutum market, North Darfur, while they were returning back to their villages. In each incident, women were forced to strip at gunpoint, raped by Janjaweed and later were left naked on the road. The circumstances of the crime indicate that the same perpetrators committed the crimes.

Case study: Flight from Kalokitting, South Darfur

349. The Commission interviewed several eyewitnesses in relation to rapes of three women, one of whom was killed, while fleeing the attack on their village Kalokitting, South Darfur, around March 2004. The Commission received the following information regarding this incident:

The village was attacked around four in the morning. Men with weapons, wearing khaki and covering their faces, entered houses. There were many weapons, including Kalashnikov, Dushka, and GM, as well as green vehicles. The army was there and everybody was wearing khaki. There were around two to three white and green planes, which came very low. One white plane was attacking. One of the victims stated as follows: "It was around 04h00 when I heard the shooting. Three of us ran together. We were neighbours. Then we realised that we did not bring our gold. When we returned, we saw soldiers. They said stop, stop. They were several. The first gave his weapon to his friend and said to me to lie down. He pulled me and threw me on the floor. He took off his trousers. He ripped my dress and there was one person holding my hands. Then he "entered" [a word for intercourse]. Then the second "entered." and the third "entered." I could not stand afterwards. There was another girl. When he said lie down, she said no. Kill me. She was young. She was a virgin. She was engaged. He killed her." The third woman who was also there stated that she was raped in the same way.

Case study: outside the Zam Zam IDP camp in North Darfur

350. The Commission also interviewed eyewitnesses of another incident that involved groups of women who went to sell firewood in the market in El Fashir around October 2004. The Commission obtained the following information:

Three separate groups of women were returning in the evening from El Fashir to the Zam Zam camp in North Darfur. One witness was in the first group, which was stopped at a checkpoint outside El Fashir, held there for some time, and then

allowed to proceed. The witness left with her group which included four other women and two children, and headed towards the Zam Zam camp. Approximately, two kilometres after the checkpoint, around 20 soldiers dressed in camouflage uniforms drove up to the group of women and ordered them to stop, while firing some gunshots. The women were told to get down off their donkeys and lie on the ground. The witness was holding her sister-in-law's one year old child who started to cry. One of the soldiers grabbed the child and threw it away on the side of the road. When one of the older women in the group asked the soldier why did he do that, he kicked her in the head. Other soldiers started to beat the other four women, including the witness. Some soldiers held one of the other women down and started raping her. At the same time, the witness was held down on the ground by soldiers who also pulled her clothing over her head. Four soldiers then had vaginal intercourse with her, one after the other. At the time this was occurring, one of the soldiers said: "You are the women of the war." The other three women, including the older one, were also raped in this incident. The soldiers were about finished raping the five women, when the second group of women who went to El Fashir to sell wood arrived at the same location. The first group of women was allowed to leave. The witness heard that the women in the second group were also raped.

Case study: outside the Krinding IDP camp, West Darfur

351. The Commission interviewed two sisters who were raped while cutting firewood in Gribi, outside the Krinding IDP camp, West Darfur, around September 2004. The Commission obtained the following credible information:

Three months before Ramadan, a group of women, three of them young, were cutting firewood in Gribi, outside the Krinding IDP camp where they have been living for the past ten months. Around 11h00, four Arab men came to them and told them to sit down. The older man was wearing khaki and three younger men were wearing Jallabia. The older men hit the witness, who is 17 years old, six times on her back and eight times on her legs. She still had marks from the incident [which were verified by the Commission]. The older man then took the witness away from the other girls and raped her. The three young men were raping other girls. The witness stated the following: "He took off only my underwear. He took his penis out of his pants. He did not say anything, he just kept beating me while he raped me. After I was so hurt and tired, I could not move and others took me to the doctor in Geneina big hospital. I was bleeding a little. The doctor did a report that I was raped. He also told me that I have something broken inside. My eight year old sister was also with me that day and was also raped but not beaten. I have injuries on my back and leg."

352. In conclusion, while the Commission was not in a position to ascertain the precise number of rapes perpetrated, it found that a sufficient number of such crimes have been committed during the attacks and in the aftermath of the attacks on villages, that these attacks have created fear among women and girls which has forced them to stay in or to return to their villages of

origin, and that this can be taken as one of the factors that led to their displacement. Particularly outrageous cases of abductions, confinement and multiple rapes over protracted periods of time have further contributed to spreading fear. Similarly, the Commission found sufficient evidence that rape and sexual violence continued to be systematically perpetrated against women during their displacement, so as to perpetuate the feeling of insecurity among them and fear of leaving the IDP sites.

353. The above patterns appear to indicate that rape and sexual violence have been used by the Janjaweed and Government soldiers (or at least with their complicity) as a deliberate strategy with a view to achieve certain objectives, including terrorizing the population, ensuring control over the movement of the IDP population and perpetuating its displacement. Cases like Kailek demonstrate that rape was used as a means to demoralize and humiliate the population.

2. Rape and other forms of sexual violence committed by rebels

354. Fewer cases of rape and sexual violence were reportedly committed by the rebels. In November 2004, the SLA allegedly hijacked and for three days held five girls from the Gimir tribe near Kulbus, West Darfur. During these three days, four of the girls were allegedly raped and one was sexually abused. Furthermore, there have been allegations that around 60 women and girls from the Beni Mansour tribe were allegedly raped or assaulted by rebels in the Malam area between February and July 2004.
355. The Commission was unable to investigate the above reports. However, during its own investigations of incidents involving rebels, the Commission did not find any cases of rape committed by the rebels.

(b.) Legal Appraisal

356. Cruel, inhuman or degrading treatment or punishment (as well as torture) are prohibited by several international human rights instruments to which Sudan is a party, including the International Covenant on Civil and Political Rights,¹⁴⁷ the Convention on the Rights of the Child,¹⁴⁸ and the African Charter on Human and Peoples' Rights.¹⁴⁹ The Convention on the Rights of the Child further requires "State Parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse."¹⁵⁰ Furthermore, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including sexual and reproductive health is guaranteed by the International Covenant on Economic, Social and Cultural Rights.¹⁵¹

¹⁴⁷ Article 7.

¹⁴⁸ Article 37.

¹⁴⁹ Article 5.

¹⁵⁰ Article 34(a).

¹⁵¹ Article 12.

357. Common article 3 to the Geneva Conventions binds all parties to the conflict and, inter alia, prohibits "violence to life and person, in particular. . . cruel treatment and torture"¹⁵² and "outrages upon personal dignity, in particular, humiliating and degrading treatment."¹⁵³ While Sudan is not a party to the Additional Protocol II to the Geneva Conventions, some of its provisions constitute customary international law binding on all parties to the conflict. This includes prohibition of "rape, enforced prostitution and any form of indecent assault,"¹⁵⁴ and "slavery."¹⁵⁵
358. Rape may be either a war crime, when committed in time of international or internal armed conflict, or a crime against humanity (whether perpetrated in time of war or peace), if it is part of a widespread or systematic attack on civilians; it may also constitute genocide. Rape has been defined in international case law (*Akayesu*, at § 597–598; *Delalić and others*, at § 479; *Furundžija* at §185, and *Kunarac and others* (at §§ 438–60), in the judgment of the European Court of Human Rights in *M.C. v. Bulgaria* (judgment of 4 December 2003, at §§ 88–108 and 148–187) and in the "Elements of Crimes" adopted by the International Criminal Court. In short, rape is any physical invasion of a sexual nature perpetrated without the consent of the victim, that is by force or coercion, such as that caused by fear of violence, duress, detention or by taking advantage of a coercive environment.¹⁵⁶
359. In addition to rape, international law also prohibits and criminalizes, as either a war crime or a crime against humanity, any serious act of *gender violence* causing the victim to engage in an act of sexual nature by force, or by threat of force or coercion against the victim or another person, or by taking advantage of a coercive environment. The rationale for the criminalization of gender violence even when it does not take the form of coercive penetration of the human body is that such acts constitute an extreme form of humiliation and debasement of the victim, contrary to the most elementary principles of respect for human dignity.
360. It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and

¹⁵² Article 3(1)(a).

¹⁵³ Article 3(1)(c).

¹⁵⁴ Article 4(2)(e).

¹⁵⁵ Article 4(2)(f).

¹⁵⁶ See *Akayesu*, at §§ 597–598, 686–688: "[R]ape is a form of aggression and . . . the central elements of the crime of rape cannot be captured in a mechanical description of object and body parts Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity. . . ." "The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive." "Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."

may thus well amount to a *crime against humanity*. The awareness of the perpetrators that their violent acts were part of a systematic attack on civilians may well be inferred from, among other things, the fact that they were cognizant that they would in fact enjoy impunity. The Commission finds that the crimes of sexual violence committed in Darfur may amount to the crime of rape as a crime against humanity, and it further finds that some in some instances the crimes committed in Darfur may amount to the crime of sexual slavery as a crime against humanity. Furthermore, the Commission finds that the fact that rape and other forms of sexual violence were conducted mainly against three “African” tribes is indicative of the discriminatory intent of the perpetrators. The Commission therefore finds that the elements of persecution as a crime against humanity may also be present.

361. The Commission, as noted, did not find any case of rape committed by the rebels. However, if rapes by rebel actors did in fact did take place, they would constitute war crimes.

(viii.) Torture, outrages upon personal dignity and cruel, inhuman or degrading treatment.

(a.) Factual findings

362. Incidence of torture and inhuman and degrading treatment of civilians in Darfur has been reported by several organizations. Rape, burning and beating, stripping women of their clothes, verbal abuse and humiliation of civilians were reported to have occurred frequently during attacks by the Janjaweed and the Government forces. Cruel and inhuman methods of killings, such as two cases of killing by crucifixion were reported by one organization. Acts of torture and cruel, inhuman and degrading treatment of civilians placed under forced confinement by Janjaweed and Government forces following attacks on villages were also reported. Some sources have reported torture of captured enemy combatants by both the Government and the rebels.
363. Some organizations have also reported cases of torture of individuals, arrested in connection with the conflict in Darfur, during their detention by officials of the National Intelligence and Security Services. It was reported that physical and mental suffering was systematically inflicted on the detainees as punishment for their suspected affiliation with or support of rebels, and with the purpose of obtaining information or confessions.

1. Torture and other cruel, inhuman or degrading treatment committed by the Government of the Sudan and/or Janjaweed

(a.) Torture and other cruel, inhuman or degrading treatment during attacks

364. The Commission has established facts through its own investigations that confirm torture, cruel and degrading treatment, and inhumane acts committed as a part of the systematic and widespread attacks directed at the civilian

population conducted by the Janjaweed and Government forces. Although Government forces did not generally participate directly in the commission of such acts, the Janjaweed committed the acts mostly in their presence, under their protection and with their acquiescence.

365. Inhumane acts such as throwing people, including children, into fire were committed by the Janjaweed during several attacks. Five such incidents were reported from Ubatete, Tarabebe, Tanako, Mangarsa and Kanjew villages in West Darfur. In most of these incidents victims were burnt to death. Extreme mental torture was inflicted on many mothers who saw their children burn alive after they were snatched from their arms by the Janjaweed and thrown into the fire. Houses were set on fire with the inhabitants still inside. Most of the victims in such incidents were children. Inhumane forms of killings used by the Janjaweed include crucifixion of victims during the attack on the village of Hashab in North Darfur in January 2004. In one case reported from Deleba in West Darfur, the victim was beaten to death.
366. The persons under attack, predominantly from African tribes, were commonly subjected to beatings and whipping by the Janjaweed. These included women and young girls. In many incidents victims were subjected to severe beatings as a form of torture. The Commission has seen several victims who still bear scars of these beatings, and some who suffered permanent physical damage as a result. Stripping women of their clothes and the use of derogatory language as a means of humiliation and mental torture were also common to many incidents.
367. Particularly shocking were the acts of torture and cruel and degrading treatment that accompanied other serious crimes committed by Government forces and the Janjaweed against the civilian population during the Kailek incident in South Darfur. During the attack as well as the subsequent forced confinement of the population, several persons were subjected to severe torture in order to extract information about rebels, as punishment or to terrorize the people. The Commission has heard credible accounts that those captured by the assailants were dragged along the ground by horses and camels from a noose placed around their necks. Witnesses described how a young man's eyes were gouged out. Once blinded, he was forced to run and then shot dead. The victim population was watched over by guards who used the whips they carried to control and humiliate them. Several witnesses have testified that abusive and insulting terms were used against the detainees, often calling them "slaves." Their suffering was compounded by the scarcity of food and water, and the unhygienic conditions in which they were confined in the small, controlled spaces, within which they were forced to relieve themselves, because of restrictions on their movements. Several hundred children are reported to have died during the internment from an outbreak of disease.

- (b) Torture and other cruel, inhuman or degrading treatment of detainees by the National Security and Intelligence Service and by the Military Intelligence.

368. The Commission gathered substantial evidence of the systematic use of torture by both the National Security and Intelligence Service as well as the Military Intelligence against detainees in their custody. In addition to other reliable information, the Commission has recorded testimony of those arrested in relation to the conflict in Darfur and currently under detention in Khartoum regarding torture and inhuman and degrading treatment to which they have been subjected. These include detainees kept by the National Security and Intelligence Service in a secret place of detention in Khartoum which the Commission discovered and inspected.
369. The Commission heard shocking accounts of physical and mental torture and cruel and degrading treatment to which these detainees had been subjected, and the inhuman conditions of detention in which they were kept. Most of them were repeatedly beaten, whipped, slapped and, in one case, kept under the scorching sun for four days. Three of the persons were suspended from the ceiling and beaten, one of them continuously for ten days. The Commission also met with another individual who had been tortured by the National Security and Intelligence Service for three days after his arrest from an IDP camp in West Darfur. He stated that he had been suspended from the ceiling and beaten repeatedly. The Commission saw the scars left on the bodies of these detainees and prisoners as signs of the torture inflicted on them. In most of these cases torture, including threats to life and physical integrity, were used to coerce information or extract confessions. They were blindfolded with their hands tied whenever they were transported from one place of detention to another, and sometimes food was denied to them for long periods of time.
370. The detainees kept in the secret place of detention, mentioned above, had been confined in cells with barred windows 24 hours a day, without any outdoor exercise (the cells were occupied by a varying number of detainees, ranging from 1 to 11). The detainees were not allowed regularly to use an outside toilet, situated on the same floor, and were thus, among other things, forced to use bottles to urinate inside their cells. Proper medical treatment or diet had not been made available to some of those who were suffering from serious health problems.
371. The Commission was also able to visit a Military Intelligence Detention Unit situated within the Army Headquarters in Khartoum. The Commission had been granted access to visit some military officers held in a section of the detention centre, but it soon discovered the existence of another section in the same detention centre, where no less than 40 detainees were held, most of them soldiers and non-commissioned officers (corporal, sergeant, etc). All were held in custody in connection with the conflict in Darfur (some were from Darfur, others had allegedly been arrested because they had talked critically of the Government's policy in Darfur). The detainees were held in 20 cells (a 21st cell was empty) facing a corridor in a closed

area. The cells are very cramped (their size being of about 1m by 2 m., or 1 m by 2.5–3m), with very high ceilings and some narrow openings at the top. Thirteen cells contained two detainees each, while 7 cells had only one detainee each. Most detainees were soldiers but a few cells contained soldiers and civilians. The cells have no lights, and the metal ‘window’ of the door is kept shut for most of the day, only to be opened for 10–15 minutes during prayer time (five times a day). The detainees therefore live in almost complete darkness for most of the day and night, and for periods reaching months. The cells, with concrete walls and floor, often contain no mattress or blanket, but only a mat. No exercise in the open air is allowed to the detainees. They hardly ever go out of their cell except for relieving themselves in four latrines at the end of the corridor. A urine bottle is hung on the door knob. The detainees had been given soap and/or tooth paste the day of the visit of the Commission, for the first time in months.¹⁵⁷

372. One detainee showed some scars on his back and arm, the result of beatings. Other witnesses mentioned that they often heard screams coming from that other, secret, section of the Centre.
373. Other detainees, mainly officers, were held in larger cells, and seemed to have access to a small prayer area. Similarly to what has been described above, none of the detainees met at the Military Intelligence Detention Centre had been provided with any required medical treatment. Their families do not know of their whereabouts.

2. Torture and other cruel, inhuman or degrading treatment committed by the rebels

374. As noted, some sources have reported torture of captured enemy combatants by the rebels. The Commission, however obtained no information indicating that this had taken place.

(b.) Legal appraisal

375. A number of international human rights instruments prohibit the use of torture. The Universal Declaration of Human Rights, the ICCPR, the Convention on the Rights of the Child and the African Charter on Human and Peoples’ Rights contain provisions prohibiting torture. The Sudan is party to the last three instruments, and as such is legally bound by them. The prohibition contained in the above mentioned international instruments is

¹⁵⁷ At the end of the visit of this area of the Detention Centre, an officer that accompanied the Commission when it did not interview inmates in private, insisted that Commissioners should visit a new sets of rooms ready to be used with a view to replacing in part the sets of tiny cells. The Commission visited this new area, consisting of relatively spacious rooms where up to 19 detainees could be held, and expressed the hope that the transfer should occur as soon as possible, so that at least 19 detainees of the 31 currently held in the tiny cells could be accommodated there.

absolute and non-derogable in any circumstances. Furthermore, under the International Covenant on Civil and Political Rights, even in situation of public emergency no derogation from the prohibition of the use of torture can be made.

376. In addition, the prohibition on torture is also considered a peremptory norm of international law, or in other words a norm of *jus cogens*. As such it cannot be derogated from by contrary international agreement and *a fortiori* by a national law. That the prohibition of torture in customary international law has such a legal nature was held by the ICTY in *Furundžija* (at §144, and § 153–157), by the House of Lords in *Pinochet*,¹⁵⁸ and also affirmed by the United Nations Special Rapporteur for Torture.¹⁵⁹
377. Torture and cruel treatment are prohibited under common article 3 of the Geneva Conventions. Torture is absolutely prohibited by the Geneva Conventions, both in internal and international armed conflicts.
378. In addition to torture practised in the form of beating and severely and inhumanely ill-treating detainees, mentioned above, the Commission considers, that conditions in the Military Intelligence Detention Centre witnessed in Khartoum described above amounts to torture. To compel persons in military custody to live 24 hours a day in extremely small cells similar to cages, in pitch dark, and no outdoor exercise at all, in itself amounts to torture and thus constitutes a serious violation of international human rights and humanitarian law.
379. In connection with the conflict in Darfur, torture has been carried out on such a large scale and in such widespread and systematic manner not only during attacks on the civilian population, where it was inextricably linked with these attacks, but also in detention centres under the authority of the National Security and Intelligence Service and the Military Intelligence. The Commission finds that the occurrences of torture may therefore amount to a *crime against humanity* and, given the discriminatory nature of the attacks, may also involve the crime of *persecution* as a crime against humanity.

(ix.) Plunder

(a.) Factual findings

380. The Commission has noted that the majority of the reports it has examined provide very similar accounts of systematic and widespread looting and plunder of the property of civilians by Janjaweed, in particular in the context of attacks as described above. These reports refer to witness accounts about Arabs or Janjaweed who attack, often with the support of Government troops. Looting itself is generally ascribed only to the Janjaweed, Arab or unspecified “men in uniform,” while there are no incidents of looting clearly reported to have been committed by Government forces alone. The

¹⁵⁸ *Pinochet* (Third), speeches by Lord Browne Wilkinson (in 38 *International Legal Materials*, 1999, at p. 589), Lord Hope of Craighead (ibid., p. 626), Lord Millet (ibid, p. 649–50).

¹⁵⁹ E/CN.4/1986/15, §3.

majority of the reported incidents involve the looting of cattle, food and other private property and occur during attacks on villages which often involve the killing of civilians and the destruction of the villages themselves. The looting of the property of IDPs in places to which they have been displaced has also been recorded, involving the looting of plastic sheeting, food and other household items by Janajweed.

381. In addition, a few incidents of looting have been reported by other sources where victims have identified the perpetrators as the SLM/A, JEM or simply as rebels. These incidents have mainly been directed against vehicles, either individual vehicles or vehicles in a convoy, and have mostly involved the looting of food and supplies. In a very few cases it was also reported that the rebels committed acts of looting during an attack on a village, in particular in West Darfur. There were a number of looting incidents of humanitarian vehicles and other type of banditry where the perpetrators were not identified by witnesses.
382. In the incidents reported, there seems to be no other specific geographic or temporal pattern connected to the looting of property, other than the patterns identified under the sections dealing with the crimes of destruction of villages and attacks, namely that the victims predominantly belong to the Fur, Massalit, Zaghawa and other African tribes.
383. During its missions to the Sudan and Darfur, the Commission's findings were very much in conformity with the reports examined by the Commission. Practically all of the incidents investigated by the Commission involved the looting of private property of civilians by Janjaweed in the context of combined Janjaweed and Government attacks against villages.
384. Cases of armed banditry were also reported, involving the looting of civilians in vehicles and other civilian targets. Most often, the perpetrators were unidentified.
385. A particular pattern recorded by the Commission was the fact that the IDPs and refugees interviewed would place great emphasis on the crime of looting, and explain that the Janjaweed had taken everything these persons had owned, involving all goods necessary to sustain life in the difficult conditions in Darfur, including pans, cups and clothes, as well as livestock, representing the key source of income of the affected people. Often, the IDPs and refugees had compiled detailed lists of the items looted which were presented to the Commission.
386. As examples of the witness testimonies collected by the Commission, the following two incidents are typical:

On Saturday 27 December 2003, in the village of Domai Tamait in South Darfur: "We were attacked in the early morning around the time of morning prayer which is around 05.30. [witness shows bullet wound in leg]. The attackers were on horses and camels some with uniforms. They killed 17 people, including 2 women and 2 boys, and 18 persons were injured. They looted about 1,150 cattle and about 800 sheep and goats."

In March 2004, in Dobo village in North Darfur: "They started burning everything and stealing our belongings. We were attacked the same day the plane came,

they bombed 5 cars and the Janjaweed looted the village. They took away our cattle and belongings.”

387. The Commission also investigated looting in the context of attacks by Janjaweed during August and September 2003, in the Masteri locality (West Darfur), where 47 villages had been attacked and Janjaweed had committed acts of looting. In one of the incidents, in Korcha-Turgu village, early in the morning, sometime in August 2003, hundreds of Janjaweed Arabs attacked the village. They were wearing green army uniforms and riding horses and camels. They surrounded the village and started shooting at men and boys. Six (6) men were killed and buried in single graves. The day before the attack a helicopter and an Antonov were seen flying above the village. The attackers stole all livestock. The village was burned and people sought refuge in Masteri town.
388. The Commission also found cases of looting committed by the rebel movements. In particular during attacks against police stations and other Government installations, where rebels looted arms from the Government. Usually these attacks were specifically targeted at the Government installations so as to obtain weapons and ammunition, which the rebels needed in their fight. The rebels themselves confirmed this practice to the Commission. In addition, the Commission found a few cases of looting of private property committed by the rebels. For instance, in October and December 2003 the JEM attacked Kulbus in West Darfur as described above, where they looted shops in the market. A number of cases of looting of humanitarian convoys were also noted by the Commission, although it was not possible to confirm the identity of the perpetrators.
389. In conclusion, and in conformity with most of the incidents reported by other sources, the Commission found that the majority of cases involving looting were carried out by the Janjaweed and in a few cases by the Government forces. Looting was mainly carried out against African tribes and usually targeted property necessary for the survival and livelihood of these tribes. The rebel movements also engaged in acts of looting, mainly targeting police stations so as to obtain weapons; on a few occasions the rebels also targeted private property.

(b.) Legal Appraisal

390. As noted above under customary international law the crime of plunder or pillage is a war crime. It consists of depriving the owner, without his or her consent, of his or her property in the course of an internal or international armed conflict, and appropriating such goods or assets for private or personal use, with the criminal intent of depriving the owner of his or her property.
391. The pillage of villages and the appropriation of livestock, crops, household goods and other personal belongings of the inhabitants by the Government forces or the militias under their control no doubt amounts to a *war crime*.

392. Based on the information available to the Commission, it would appear that the looting carried out mainly by the Janjaweed in the context of attacks against villages, has been conducted on a large scale and has been condoned by the Government of the Sudan through the propagation of a culture of impunity and the direct support of the Janjaweed.
393. In addition, as is the case with the destruction of villages, the Commission finds that pillaging, being conducted on a systematic as well as widespread basis mainly against African tribes, was discriminatory and calculated to bring about the destruction of livelihoods and the means of survival of the affected populations. Hence, it could very well constitute a form of *persecution as a crime against humanity*.
394. The Commission also finds it plausible that the *rebel movements* are responsible for the commission of the war crime of plunder, albeit on a limited scale.

(x.) *Unlawful confinement, incommunicado detentions and enforced disappearances*

(a.) Factual findings

395. Reports from other sources reviewed by the Commission contained information on abductions, unlawful confinement and detention of civilians occurring during and after attacks by the Janjaweed or Government forces, as well as by the rebels. Many of the reports pertain to the abduction of women. While incidents were reported, very few of the accounts contained much detail.
396. However, through its own investigations the Commission was able to gather more substantial information on enforced disappearances. This information confirms the abduction and enforced disappearances conducted by Janjaweed following attacks on villages. In many of the cases women and men were abducted or disappeared, many without any trace. The Commission has also established that Government armed forces, the state security apparatus and military intelligence are responsible for unlawful confinement and detention of civilians. Furthermore, the Commission has received credible information which demonstrates a pattern of unlawful confinement of individuals within IDP camps. Many IDPs with whom the Commission met were unable to move even a few meters from their camp for fear of attacks, including rape and killing, by Janjaweed. The Commission heard credible testimonies from women who had been attacked, beaten and in some cases raped, while fetching firewood or water outside the camp. In some cases, IDPs were prevented from accessing their cattle and crops nearby, due to the threat of attacks outside the camps by Janjaweed. This pattern is reflected in the following witness testimony from Fato Barno, North Darfur:

The people from all surrounding villages of Fato Barno are now living in Fato Barno IDP camp in very distressed condition. We want to go back to villages and live there. But the villages are not safe to live. The Janjaweed are still very active on

the outskirts of our IDP camp. The people living in our IDP camp often face attack from Janjaweed when they go out of the camp. There is a Government police camp nearby our camp but the police have failed to protect our people from the Janjaweed attack. Two months ago, Janjaweed attacked my uncle and his sister when they went outside Fato Barno IDP camp towards the village of Krene. Janjaweed killed my uncle's sister and shot my uncle in his right shoulder and right leg.

397. Abduction of women by Janjaweed was also found to be a part of some of the incidents of attacks investigated by the Commission, including in Tawila, North Darfur, and Mallaga, Mangarsa and Kanjew in West Darfur. Those who escaped or were eventually released were able to relate the enforced confinement, sexual slavery, rape and torture that they had to suffer. As a general pattern, women were forcibly taken from their villages and kept at Janjaweed camps for a period of time, some times as long as three months, before they were either released or managed to escape captivity.
398. In some incidents of attacks by Janjaweed men and boys were also abducted and, in many of these cases are still missing. The Commission received evidence that civilians have been abducted by leaders of the Janjaweed and detained in camps that the Commission has identified where they were tortured and used for labour. During pre arranged monitoring visits of independent observers, these civilians were taken out of the camp and hidden. The Commission has credible evidence that the military is in control of these camps and army officers were aware of the illegal detention of civilians in the camp. In one case a civilian was seized by the Janjaweed after an attack on his village, was kept in captivity in a Janjaweed camp and later shifted to military camp in the area.
399. The most serious cases of enforced disappearances involved the disappearance of civilians by security and intelligence apparatus, both civil and military. The Commission received credible information that several individuals were taken away by military intelligence or security operators. While some of these individuals subsequently returned, many remain unaccounted for. Those who did return have given credible testimony of the presence of many of those missing in unofficial and secret places of detention maintained by the security apparatus in different locations in the Darfur region.
400. In one case, during a joint attack in March 2004 by the Janjaweed and Government armed forces on several villages around Deleij in the Wadi Saleh area of West Darfur, 300 people were seized and taken away by the Government forces. Almost half of these persons are still missing and many are feared to have been killed.
401. Illegal arrest and detention of individuals appears to be common practice in operations by the state security apparatus relating to the conflict in Darfur. The Commission met with persons held in secret detention. These detainees included students, lawyers and traders. In many of these cases their families were unaware of their arrest or of their whereabouts. Amongst them was one 15 year old boy who had been arrested in Nyala, North Darfur, in November 2004 when he was returning home from work. His family

did not know of his arrest or of his whereabouts. He was epileptic, and had not received any medical help since his detention. All of the detainees were held incommunicado. Except for the case mentioned above, all had been detained for more than three months, and in one case for almost a year, without any charge. They had never been produced before a court, nor allowed to see a lawyer.

402. The Commission has also received credible information on cases of abduction by the rebels. In one case of rebel attack on Kulbus, towards the end of 2003, 13 men were abducted and are still missing. In another attack on a village in Zalatia area in West Darfur, three children were abducted by a rebel group. These children are still missing. The Commission received further information on the abduction by rebels of individuals from Fata Borno, Magla, and Kulkul. The rebels accused these persons of collaborating with Government and Arab tribes. The Commission received credible information that these persons were tortured and subjected to cruel, inhuman and degrading treatment. In other cases individuals were abducted after their vehicles were seized and taken by the rebel groups. Both the SLA and JEM have been named as those responsible for these incidents.

(b.) Legal appraisal

403. The right to liberty and security of person is protected by Article 9 of the ICCPR. The provisions of this Article are to be necessarily read in conjunction with the other rights recognized in the Covenant, particularly the prohibition of torture in Article 7, and article 10 that enunciates the basic standard of humane treatment and respect for the dignity of all persons deprived of their liberty. Any deprivation of liberty must be done in conformity with the provisions of Article 9: it must not be arbitrary; it must be based on grounds and procedures established by law; information on the reasons for detention must be given; and court control of the detention must be available, as well as compensation in the case of a breach. These provisions apply even when detention is used for reasons of public security.
404. An important guarantee laid down in paragraph 4 of Article 9 is the right to control by a court of the legality of detention. In its General Comments the Human Rights Committee has stated that safeguards which may prevent violations of international law are provisions against incommunicado detention, granting detainees suitable access to persons such as doctors, lawyers and family members. In this regard the Committee has also stressed the importance of provisions requiring that detainees should be held in places that are publicly recognized and that there must be proper registration of the names of detainees and places of detention. It follows from the Comments of the Committee that for the safeguards to be effective, these records must be available to persons concerned, such as relatives, or independent monitors and observers.
405. Even in situations where a State has lawfully derogated from certain provisions of the Covenant, the prohibition against unacknowledged detention,

taking of hostages or abductions is absolute. Together with the human right of all persons to be treated with humanity and with respect for the inherent dignity of the human person, these norms of international law are not subject to derogation.

406. The ultimate responsibility for complying with obligations under international law rests with the States. The duty of States extends to ensuring the protection of these rights even when they are violated or are threatened by persons without any official status or authority. States remain responsible for all violations of international human rights law that occur because of failure of the State to create conditions that prevent, or take measures to deter, as well as by any acts of commission including by encouraging, ordering, tolerating or perpetrating prohibited acts.
407. The importance of determining individual criminal responsibility for international crimes whether committed under the authority of the State or outside such authority stands in addition to State responsibility and is a critical aspect of the enforceability of rights and of protection against their violation. International human rights law and humanitarian law provide the necessary linkages for this process of determination.
408. With regard to international humanitarian law, common Article 3 of the Geneva Conventions prohibits acts of violence to life and person, including cruel treatment and torture, taking of hostages and outrages upon personal dignity, in particular, humiliating and degrading treatment.
409. According to the Statute of the International Criminal Court, enforced disappearance means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.¹⁶⁰ When committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, these acts may amount to a crime against humanity.¹⁶¹

¹⁶⁰ Rome Statute of the International Criminal Court, article 7(2)(i). Similarly, the Declaration on the Protection of All Persons from Enforced Disappearances defines an enforced disappearance as when 'persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups, or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.'

¹⁶¹ The elements of the crime of enforced disappearance relevant to the Commission's findings are that the perpetrator

(a) Arrested, detained or abducted one or more persons; or

(b) Refused to give information on the fate or whereabouts of such person or persons.

¹ Such refusal was preceded or accompanied by the deprivation of freedom.

² The perpetrator was aware that such refusal was preceded or accompanied by that deprivation of freedom.

410. The abduction of women by Janjaweed may amount to enforced disappearance as a crime against humanity. The incidents investigated establish that these abductions were systematic, were carried out with the acquiescence of the State, as the abductions followed combined attacks by Janjaweed and Government forces and took place in their presence and with their knowledge. The women were kept in captivity for a sufficiently long period of time, and their whereabouts were not known to their families throughout the period of their confinement. The Commission also finds that the restraints placed on the IDP population in camps, particularly women, by terrorizing them through acts of rape or killings or threats of violence to life or person by the Janjaweed, amount to severe deprivation of physical liberty in violation of rules of international law.
411. The Commission also finds that the arrest and detention of persons by the State security apparatus and the Military intelligence, including during attacks and intelligence operations against villages, apart from constituting serious violations of international human rights law, may also amount to the crime of enforced disappearance as a crime against humanity. These acts were both systematic and widespread.
412. Abduction of persons during attacks by the Janjaweed and their detention in camps operated by the Janjaweed, with the support and complicity of the Government armed forces amount to gross violations of human rights, and to enforced disappearances. However, the Commission did not find any evidence that these were widespread or systematic so as to constitute a crime against humanity. Nevertheless, detainees were subjected to gross acts of violence to life and person. They were tortured or subjected to cruel and humiliating and degrading treatment. The acts were committed as a part of and were directly linked to the armed conflict. As serious violations of Common Article 3 of the Geneva Conventions, binding on the Sudan, the Commission, finds that the acts constitute war crimes.
413. Abduction of persons by the rebels also constitute serious and gross violations of human rights, and amount to enforced disappearance, but the Commission did not find any evidence that they were either widespread or systematic in order to constitute a crime against humanity. The Commission, nevertheless, has sufficient information to establish that acts of violence to life and person of the detainees were committed in the incidents investigated by the Commission. They were also subjected to torture and cruel, inhuman

⁴ Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.

⁵ The refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.

⁶ The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

⁷ The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

⁸ The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

and degrading treatment. The acts were committed as a part of and directly linked to the armed conflict and, therefore, constitute war crimes as serious violations of the Common Article 3 of the Geneva Conventions.

(xi.) Recruitment and use of children under the age of 15 in armed hostilities

(a.) Factual findings

414. There have been some reports by other sources of the use of child soldiers by the two rebel groups JEM and SLA. These reports, however, contained no details regarding, for instance, the manner of their recruitment or the area of their deployment. The Government of the Sudan also made this allegation against the rebels, but did not produce any concrete information or evidence that could assist the Commission in making a finding of fact on this issue.
415. Inquiries made by the Commission indicate that both JEM and SLA have recruited children as soldiers. There is, however, no indication that these are forced recruitments. These children have been seen in uniforms and carrying weapons in and around the rebel camps. Independent observers confirmed the presence of child soldiers in areas of conflict. While the Commission cannot rule out their participation in combat, it did not receive credible information on deployment of child soldiers in armed combat.
416. In its meetings with leaders of both rebel groups, the Commission did confront them with these allegations. Both groups deny the use of children in armed combat. The SLA leadership does not deny that children are living in some of their camps. However, they deny that these are child soldiers or take any part in armed hostilities. According to them, these children were orphaned as a result of the conflict and the SLA takes care of them. The Commission does not find this explanation convincing. As stated above, different sources have confirmed that the children are in uniform and carry weapons. The Commission, therefore, cannot rule out their engagement in combat.

(b.) Legal appraisal

417. As stated above, an international customary rule has evolved on this matter to the effect that it is prohibited to use children under 15 in armed hostilities. The Sudan has also ratified Convention 182 of the International Labour Organization concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits the "forced or compulsory recruitment of children for use in armed conflict." The Convention defines children as all persons under the age of 18. Furthermore, the rebels, like the Government of the Sudan, are bound by Article 8 of the Protocol on the Enhancement of the Security Situation in Darfur in Accordance with the N'Djamena Agreement, of 9 November 2004. Under this provision, "The Parties shall refrain from recruiting children as soldiers or combatants, consistent with the African Charter on the Rights and

Welfare of Children, the Convention on the Rights of the Child (CRC) and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.”

418. It follows that if it is convincingly proved that the Government or the rebels have recruited and used children under 15 in active military hostilities, they may be held accountable for such a crime.VI. Action of Sudanese Bodies to Stop and Remedy Violations
419. The Government of the Sudan was put on notice concerning the alleged serious crimes that are taking place in Darfur. It was requested not only by the international community, but more importantly by its own people, to put an end to the violations and to bring the perpetrators to justice. While several Government officials acknowledged that serious violations of human rights and humanitarian law took place in Darfur, they maintained however that they have been acting responsibly and in good faith to stop the violence and address the crisis. Some argued that while it was sometimes argued that the Government was unable to deal with all the problems, nobody could claim that it was unwilling.
420. The section below assesses the effectiveness of the measures taken by the Government of the Sudan particularly to investigate these crimes and to bring their perpetrators to justice. It focuses on the role of law enforcement agencies in particular, particularly the police, examines some aspects of the legal and judicial system, and assesses some extra-judicial mechanisms such as the National Commission of Inquiry and the Rape Commissions.

1. Action by the police

421. The role of the police in the current conflict is far from clear. The Government claims that this institution was weakened as a result of the conflict in Darfur. Attacks on police stations and garrisons and looting of weapons by the rebels have been an important feature of this insurgency. In fact, the Government claims that between January 2003 and November 2004, 685 policemen were killed by rebels, 500 were injured, 62 were missing, and 1247 weapons were looted from police stations.¹⁶² It states that this resulted in a breakdown of law and order and encouraged banditry and crime.
422. Normally, in an international armed conflict the civil police force does not formally take part in the hostilities and can, at least theoretically, be considered as a non-combatant benefiting from the safeguards and protections against attack. However, in the particular case of the internal conflict in Darfur, the distinction between the police and the armed forces is often blurred. There are strong elements indicating occurrences of the police fighting alongside Government forces during attacks or abstaining from preventing or investigating attacks on the civilian population committed by the Janjaweed. There are also widespread and confirmed allegations that some members of the Janjaweed

¹⁶² Figures provided by a Ministry of Interior Committee to the Commission on 19 November 2004.

have been incorporated into the police. President El-Bashir confirmed in an interview with international media that in order to rein in the Janjaweed, they were incorporated in “other areas” such as the armed forces and the police.¹⁶³ Therefore, the Commission is of the opinion that the ‘civilian’ status of the police in the context of the conflict in Darfur is questionable.¹⁶⁴

423. Victims, however, sometimes also attributed a positive role to the police. They told the Commission that the police were indeed targeted during the attacks on villages, but they mainly blamed the Janjaweed for these actions. Also while victims often express lack of confidence in the ability and willingness of the Government to protect them, the police was often cited as an exception to this trend. The reason is perhaps that apart from its leaders, most of the police in Darfur were Darfurians. Some witnesses informed the Commission that during attacks by the Janjaweed, the police, often small in numbers, attempted to protect the villagers, but were often ill-equipped and heavily outnumbered. One example was an attack on Molli (Masaalit tribe) by the Janjaweed on 23 April 2003—a market day. Market stalls were totally destroyed and livestock looted. Police made arrests of seven Janjaweed, but they were released by a court order, ostensibly for lack of evidence.
424. That the Janjaweed overpower the police is a trend that started even before the current crisis and could be detected from information provided by the Government itself. For instance, the judgment in a case known as *Jagre al-Hadi al Makbul and others* describes how a combination of the police and armed popular forces numbering 39 left the inhabitants of Thabit at the mercy of a large contingent of ‘Fursan’ attackers.¹⁶⁵ The case involves the two Arab tribes of Maalia and Rizigat. The facts of the case are that a Rizigat member of the national security was killed in a fight with two Maalia policemen. Forty days after the event, 700 to 800 Fursan in uniform and equipped with weapons gathered to revenge his death. They attacked and killed 54, wounding another 24 and burning houses before retreating with looted cattle and household property. According to the judgment, the 39 official forces, including police and the popular forces, requested their headquarters to allow them to engage the attackers, however the headquarters refused because of the disparity in numbers. The official forces then withdrew.
425. With the escalation of the crisis and the ineffectiveness of the police to address the crisis, the people in Darfur appear to have no faith in this institution. A number of victims informed the Commission that they would not

¹⁶³ See interview on CNN of 31 August 2004, transcript at <http://edition.cnn.com/2004/WORLD/africa/08/31/amanpour.bashir/index.html>; accessed on 2 January 2005.

¹⁶⁴ The situation is different for the few reported cases where the Janjaweed are alleged to have killed police officer. In these cases, no legal justification can be found in international humanitarian law. The Janjaweed engaging in the armed conflict are siding with the Government, and thus with the police.

¹⁶⁵ The case was decided by the Special Court of Nyala – South Darfur which describes events that took place on 18 May 2002 involving 96 defendants, and where the court sentenced 88 persons to death, 1 for 10 years, as well as the confiscation of weapons and return of property.

go to the police to submit complaints against actions by the official forces or the Janjaweed. They did not think that the police would pursue the complaint and they feared reprisals. In fact, when officials in the three states of Darfur were requested to submit information on the number of registered complaints, they mainly provided lists of complaints registered as a result of attacks by the rebels. As for attacks by Janjaweed, little information was provided. The most extensive list of complaints against the Janjaweed was provided by the Governor of North Darfur. It included 93 complaints registered between February 2003 and November 2004. The list was, however, silent on the measures taken by the police to pursue these complaints.

426. The Government claimed that there were between 9,000 and 12,000 policemen deployed in Darfur to protect the IDPs. The impact of this presence was, however, not felt by the IDPs, as the situation at the Fata Burno IDP camp illustrates. The inhabitants there were confined in an area defined by a reddish rock and a riverbed (Wadi). Any attempt by the IDPs to venture beyond the confined area was met with shots from the Janjaweed in their nearby mountainous hideout. The police, located at the edge of the camp, showed no interest in confronting the Janjaweed. It stands to reason to assume that the police presence is more for political reasons than any form of protection. Also, between 27 September 2003 and May 2004, seven villages¹⁶⁶ near Nyala were persistently attacked by the Janjaweed. It resulted in the displacement of over 1000 civilians. No action was taken by police against the Janjaweed.
427. Several procedural hurdles prevented the police from acting effectively. An example was the practice whereby victims of certain crimes in Darfur, such as rape, required what was termed 'Form 8' from the police before they would be able to receive medical examination and treatment. A directive titled "The Minister of Justice Criminal decree 1/2004," effective from 21 August 2004, was adopted to dispense with that requirement. However, it was clear from interviews conducted by the Commission with rape victims, including in Zam Zam IDP camp in North Darfur, that the police still applied the Form 8 rule. The prosecutor's office and the police were hesitant when asked about their knowledge of the decree and it was clear to the Commission that they were not aware of the existence of the decree. Similarly, judicial officials in Khartoum were unaware of both the August 2004 decree and of a subsequent decree on the same subject matter, which was effective from 11 December 2004.

2. Action by the Judiciary

428. The Commission repeatedly requested the Government to provide information on judicial action taken to bring to justice the perpetrators of the alleged crimes committed in Darfur. Despite repeated requests from the Commission,

¹⁶⁶ Umalhairan, Rahad Alnabag, Faralch Oldalyba, Draib alrech, Umbaouda, Baba, Kashlango.

the Government continued to cite just one case relevant to the Commission's mandate and on which the judicial system had taken action in 2003. This was the case of *Jamal Suliman Mohamad Shaye* in the village of Halouf regarding the killing of 24 individuals, some of them women and children, looting of property, and the burning of the village. Two other cases referred to the Commission as evidence of action by the judiciary were firstly, the case of *Jagre al-Hadi al Makbul and others* before the Special Court of Nyala mentioned above, and secondly the case of *Hafedh Mohammed Dahab and others* regarding the attacks on the village of Jugma and Jabra which resulted in the killing of 4 people, including the burning of one individual, injuring others, as well as the looting and burning of houses. However, both of these cases concerned events that occurred in 2002. The Commission thus considers that Government failed to demonstrate that it had taken measures to prosecute those involved in the attacks that had taken place since February 2003.

429. The Government also cited its acknowledgement of three cases of mistaken bombings. It stated that it compensated the victims of Habila, Um Gozin, and Tulo. The head of the military committee that was established to compensate the victims in Habila briefed the Commission. He claimed that the victims were reluctant to receive compensation. The Commission learnt from other sources, however, that the real reason was that the victims were insisting that a comprehensive investigation into the alleged mistake take place.
430. The Government charged that the rebels attacked court buildings and personnel, implying that this had weakened their effectiveness. Citing an example, the Commission was informed that during an attack on Kutum, North Darfur on 1 August 2003, the rebels attacked the criminal court and the houses of the judges, looting their contents. Documents, evidentiary material and files were also burned. During an attack on 10 July 2004 on the village of Alliet, which has been the subject of frequent attacks by the SLM/A and the JEM, as well as Government forces, a judge was abducted by the rebels. He was later released on 13 of August 2004. In another attack on the same village on 20 September 2004, the Government claimed that rebels attacked the court and destroyed furniture and documents. The house of the judge was apparently also looted.
431. According to the Commission's findings, it unlikely that the legal and judicial systems in Sudan in their present form are capable of addressing the serious challenges resulting from the crisis in Darfur. Victims often expressed lack of confidence in the ability of the judiciary to act independently and in an impartial manner. Having some senior judges in Darfur involved the design and implementation of controversial policies such as the return of IDPs, weakened the credibility of the judiciary in the public eye. A brief description of the judicial system and an assessment of its ability to do justice in accordance with international human rights standards are provided below.

(i.) An Overview of the Sudanese Judicial System

432. The 1998 Constitution asserts the independence of the Judiciary. However, the Judiciary appears to have been manipulated and politicised during the

last decade. Judges disagreeing with the Government often suffered harassment including dismissals.

433. Article 103 of the Constitution spells out the structure of the country's judicial system which includes the Supreme Court, Courts of Appeal and Courts of first instance. In a hierarchical fashion, the Supreme Court, a three-member Bench and the highest and final judicial authority, is positioned at the apex. Its decisions on appeals from the Court of Appeal on criminal, civil, personal and administrative matters are final and may only be interfered with by the Chief Justice, if in his view a particular Shari'a law has been infringed.
434. Each of the state capitals has a Court of Appeal presided over by three judges. Appeals on criminal, civil and personal matters from the public courts lie to the Court of Appeal. The court can review its own decisions and has a single-judge-first-instance jurisdiction to review matters of administrative authority.
435. The Public Courts are set up under the 1991 Code of Criminal Procedure, which allows the Chief Justice to constitute them but also to determine their jurisdiction. The courts' jurisdiction is partly appellate and partly courts of first instance. Appeals from the District Courts lie to the Public Courts. The original jurisdiction of the courts lies in the adjudication of cases with commercial bias, as well as cases involving personal status of non-Muslims.
436. District Courts have original and appellate jurisdictions to hear appeals on civil (Civil Procedure Act 1983) and criminal matters (Criminal Act 1991) from the Town Courts. The pecuniary powers of the courts in civil cases as well as their penal powers as regards the imposition of fines in criminal matters are defined by the Chief Justice.
437. The Town Courts are the lowest courts in the Sudan. Decisions rendered by the Town Courts may be appealed to the District Courts. They are popular courts whose members are chosen from among citizens of good conduct. A distinctive feature of these courts is their application of customs, not inconsistent with general law or with public policy. In most cases they resort to conciliation and accord in solving disputes over areas of pasture, water and cultivation. They are established under a warrant issued by the Chief Justice.
438. In addition, a Constitutional Court established by *Article 105* of the Constitution basically considers and adjudicates on matters relating to the interpretation of articles of the constitution and among others, "claims by the aggrieved for protection of freedoms, sanctities or rights guaranteed by the Constitution." As the President suspended significant provisions in the Constitution in 1999 and granted wide powers to the security apparatus, there is little proof that this court is effective.
439. Despite the above structure, a system of special and Specialized Courts has been established, particularly in Darfur. Cases of interest to the Government appear to be referred to these courts. In addition to these courts described below, the President has established some extraordinary courts to try specific cases. For instance, a case involving 72 army officers, mostly

from Darfur, was referred to such an extraordinary court in Khartoum. A judge was brought from Kordofan to specially try the case.

440. On 12 January 2005, the Commission observed one session in a trial of a group of 28 individuals from Darfur. They included a number of air force pilots who had refused to participate in bombing areas in Darfur. Although the session was tense, the Commission was told that it was the first time that the trial had been conducted in accordance with the regular proceedings. In previous sessions, even questions on legal issues by the defence were refused. The defence team was dismissed by the court at one stage. During that period, witnesses were examined and confessions against the defendants were obtained. When a witness changed his statement during the trial session following the intervention of defence lawyers, the court started perjury proceedings against him. He collapsed in the court.

(ii.)The Specialised Courts

441. Initially established as Special Courts by decrees under the State of Emergency in Darfur in 2001, the courts were in 2003 transformed into Specialised Courts. A decree issued by the Chief Justice on 28 March 2003 first established the Specialized Court in West Darfur, and later did the same in North and South Darfur. They failed, however, to remedy certain flaws in the Special Courts which were passed down to the Specialised Courts.
442. The Specialised Courts inherited the functions and jurisdiction of the Special Courts. Thus, as its predecessor, the new courts try charges of armed robbery, banditry, offences against the State, possession of unlicensed firearms, attacks against the State, disturbing public order, and any other crimes that the Chief Justice or the head of the Judiciary may include in the court's jurisdiction. The majority of those tried under these courts for possession of arms are said to be from farming communities and practically never from nomadic tribes.
443. Special courts were headed by a judge sitting with a member of the police and a member of the army. However, since a single judge sitting alone now heads a Specialised Court, the Sudanese authorities argue that these courts are an improvement compared to the previous courts. A further argument is that they have been established for reasons of expediency.
444. The specialised criminal courts were created in particular for Darfur and Kordofan, apparently to help expedite the hearing of certain cases. However, the reason for their establishment may be described as 'fast tracking' rather than 'expediency', particularly in light of the fact that, according to reports, the hearing of a charge punishable by death penalty may take no more than one hour.
445. One flaw inherent in the 2003 Decree which established the courts, is its failure to ensure that confessions extracted under torture or other forms of duress are excluded from the evidence. It is fundamental to the principles of due process that an accused must not be compelled to testify against himself or herself or to confess to guilt (*article 14,3(g) ICCPR*). Therefore, when

an accused challenges in court that his alleged confession was extracted under torture, the court is put on notice to investigate the challenge and to rule, giving reasons, for the admissibility or otherwise of the alleged confession before continuing. There are several examples however to demonstrate that the specialized courts do not proceed in this manner. It has been reported that an individual was arrested in January 2004 on charges relating to banditry. He was said to have been tortured by security forces resulting from which he confessed to the charge. At his appearance in court in June 2004, he told the judge he had confessed under torture and sought to withdraw the confession. The judge summarily declined the withdrawal and the case proceeded against the accused. Any law which ignores the procedure of investigating a challenged confession and so allows a judge to summarily refuse the withdrawal of the confession, is contrary to the rights of the accused.

446. The Special Courts decree allowed the accused to be represented by "friends" only. In other words the accused could not exercise the right to be represented by a counsel of choice. Though the 2003 decree allows for legal representation, it lacks fullness. Counsel has limited time to cross examine prosecution witnesses and to examine defence witnesses and there are restrictions for visiting the accused in detention to facilitate the preparation of his defence.
447. The trials are still conducted summarily, as was done by the Special Courts and the death penalty may be pronounced by the court for a wide-range of offences. According to the decree, an appeal must be filed within seven days to the head of the judiciary, who delegates the case to members of the Court of Appeal. This is a rather short period, considering that court records and grounds for appeal need to be prepared before completing filing. Also interlocutory decisions are not subject to any appeal. One cannot but believe that there is an element here to discourage convicted persons from appealing against their convictions. Save for sentences of death, amputations, or life imprisonment, which are heard by a panel of judges, the appeals are heard by one judge. There is no possibility of further judicial review. In a situation where the right of appeal is limited, the likelihood that innocent persons may be put to death is increased.
448. The court does not appear to draw a distinction between adult and minor offenders. Minors are therefore at risk of receiving the death sentence, particularly so when they are charged and stand trial together with adults. On a reliable account a trial of seven persons arrested at the Kalma IDP camp included two persons under the age of 18. All seven denied the charge and have alleged police brutality. At the Nyala Specialised Court where they were standing trial for murder, they faced the death penalty if convicted.
449. The fact that the Specialised Courts apply principally to the Darfurs and Kordufan, rather than to the whole of the Sudan, calls into question the credibility and reliability of these Courts. The purpose of the courts is too glaring to miss. The Government would do a great service to its judicial system if it took steps to repeal the decree that established the Courts. The Commission recommends that the Government ensure the closure of the Courts.

3. *Sudanese Laws Relevant to the Present Inquiry*

450. A number of serious flaws prevent the justice system in Sudan from acting swiftly and appropriately to address abuses. Much could be said about the compatibility of Sudanese laws with international standards. A state of emergency was declared in Sudan in 1999 and has been consistently renewed since then. Important constitutional guarantees are suspended. In effect, Sudan is still mainly ruled by decrees. An example is the Specialised Court decree. Judicial officials tried to explain off the 113 passing of decrees as an interim measure taken when Parliament is in recess, which Parliament may retain or repeal when it reconvenes. Asked what would be the fate of a suspect convicted under the decree before a Parliamentary action to repeal the law, one response was, "it's not reversible." The other was that the conviction may be quashed on appeal. One cannot but view the continued parallel use of decrees and laws as tending to make the parliamentary process a charade.
451. Furthermore, the Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity. Also the 1991 Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. The law provides wide powers to the executive and grants immunity from prosecution to many state agents. To illustrate some of these problems, the provisions of the National Security Forces Act of 1999, are presented below as an example.
452. By Section 31 of the National Security Law, an order issued by the Director General, a security agent can carry out an arrest, a search, detain and investigate an individual. He has three days within which to furnish the detainee with reasons for his arrest and detention. The period may be extended for 3 months by the Director General and may, with the approval of the attorney general, be renewed for a further 3 months. If it is deemed necessary, the Director General may request the national Security Council to renew the detention for a further 3 months. A detainee may appeal this decision before a judge. There are no guarantees, however, for immediate access to counsel. The prescribed period of detention under Section 31 is frequently ignored. The Commission met numerous detainees in security detention centres who were detained for longer periods without access to a lawyer nor an appearance in court.
453. Section 9 of the Act gives certain powers to a member of the organ designated by the Director General to execute particular functions. It empowers seizure of property of detainees "in accordance with law". A right under section 32(2) allows the detainee to communicate with his family "where the same does not prejudice the progress of the interrogation, inquiry and investigation of the case". These qualifying phrases negate clarity and only succeed in bringing vagueness and inferiority into the law. Even if members of the detainee's family are aware of the right to communicate or from where the family may apply for permission to make contact with their relatives, it is doubtful that they will have the courage to brave the aura of fear that surrounds the security apparatus. Investigations conducted by the

Commission disclose that more often than not, the permission when sought by the courageous few, is not granted. In the result the detainee becomes an *incomunicado* detainee, his detention sometimes exceeding a 12-month period, without charges, with no access to counsel, no appearance in court and not permitted visitors. At Kobar prison in Khartoum the Commission interviewed a number of such detainees. Others have been detained at a North Khartoum prison since January 2004 in similar circumstances. A gross violation of the rights of the detainees and a contravention of *Article 14. 3(c)* of ICCPR. In addition, the National Security apparatus violates section 31 of its own law which indicates that after the prescribed period of detention, that is to say a maximum of 9 months, the detainee must be tried or released.

454. Section 33 gives wide immunities to members of the National Security and Intelligence Services and their collaborators. None of them shall be compelled to give information about the organisation's activities which they have come by in the course of their duty. Except with the approval of the Director, no civil or criminal action shall lie against either of them for any acts they may have committed in connection with their work, which approval the Director will grant only if the action is unrelated to their duties. Their right to institute action for compensation against the State is however preserved. Where the Director approves that an action proceeds against a member of the force and his collaborators, and the action is based on acts done in the course of official work, be it during or after termination of employment, the trial will take place in an ordinary court but will be heard in secret. Again, this is contrary to Article 14.1 of ICCPR which sets down "public hearing" as a basic standard for a fair trial. When confronted with trials in "secret," Mr. Sallah Abdallah, also known as Mr. Sallah Gosh, (the Director General of National Security and Intelligence Service) described the English translation as inaccurate. Since then the Commission has had the Arabic text translated, and it is clear that the trial in "secret" is part of the law. The clear inference from section 33, is that a security member can, under the umbrella of the law, torture a suspect, even to death, if his acts are done in the course of duty. The Commission strongly recommends the abolition of this law.
455. Based on the above, the Commission considers that in view of the impunity which reigns in Darfur today, the judicial system has demonstrated that it lacks adequate structures, authority, credibility, and willingness to effectively prosecute and punish the perpetrators of the alleged crimes that continue to exist in Darfur.

4. Action by Other Bodies

(i.) The Sudanese Commission of Inquiry

456. The President set up a National Commission of Inquiry (hereinafter "the National Commission") on 8 May 2004. This ten member body was mandated to collect information of alleged violations of human rights by armed groups in the Darfur states, inquire into allegations against armed groups

in the area and the possible resulting damage to lives and property and to determine the causes of the violations when established. The Commission was provided a copy of the final report of the National Commission on 16 January 2005.

457. The final report indicates the National Commission's method of work. It met 65 times, listened to 228 witnesses, and visited the three states of Darfur several times. It visited 30 incident locations and met with the local authorities, particularly the armed forces. It requested documents from various governmental bodies and reviewed the reports of the organizations that visited Sudan, including the United Nations, the Organization of African Unity and the Organization of the Islamic Conference, as well various human rights groups, particularly Amnesty International and Human Rights Watch, as well as reports by some Governments, particularly the United States and the European Union. In other words, the National Commission was fully aware of the serious allegations of the crimes committed in Darfur.
458. The report starts with providing an overview of Darfur. It devotes a major part to the crime of genocide. It discusses five crimes: bombing civilians in the context of the Geneva Conventions; killings; extra-judicial killings, rape as a crime against humanity, and forcible transfer, and ethnic cleansing.
459. Below is an unofficial translation of the main findings of the National Commission, as they appear in its Executive Summary:

Serious violations of human rights were committed in the three Darfur States. All parties to the conflict were involved, in varying degrees, in these violations which led to much human suffering that obliged the people of Darfur to migrate to State capitals and to take refuge in Chad.

What happened in Darfur, despite its gravity, does not constitute the crime of genocide because of the unavailability of the genocide determination conditions. The National Commission had no proof that any of the protected ethnic, religious, racial or national groups was subjected, in bad faith, to bodily or mental harm or to living conditions targeted at its total or partial extermination. The Darfur incidents are not similar to what happened in Rwanda, Bosnia or Cambodia. In those precedents, the State concerned pursued a host of policies leading to the extermination of a protected group.

The National Commission had proof that the Darfur incidents were caused by the factors mentioned in the report and the explained circumstances. It also had proof that describing the incidents as genocide was based on exaggerated unascertained figures relating to the numbers of persons killed.

The National Commission had proof that the Armed Forces bombarded certain areas in which some opposition members sought shelter. As a result of that bombardment, some civilians were killed. The Armed Forces investigated the incident and indemnified those who sustained damage or loss in the areas of Habilah, Umm Kazween and Tolo. The Wad Hagam incident is still being investigated.

The National Commission had proof that the armed opposition groups committed similar acts killing unarmed citizens as well as wounded military personnel in Buram hospital and burning some of them alive.

The National Commission also had proof that many of the killing incidents were committed by various tribes against each other in the context of the conflict going on in certain areas such as Sania Deleiba, Shattaya etc.

The killing of citizens in all the aforementioned cases constitutes a violation of Common Article 3 of the 1949 Geneva Conventions. . . .

The killing incidents committed by all the armed conflict parties, which, under their various circumstances, may come up to a violation of Common Article 3 of the 1949 Geneva Conventions, do not, in the opinion of the National Commission, constitute a genocide crime because of the unavailability of the elements of this crime, particularly the absence of any proof that any protected group was targeted and the absence of a criminal intent.

Allegations of summary executions were received from all parties. However, some of these allegations were not proved beyond any doubt. Therefore, the National Commission recommended that an independent judicial investigation should be conducted . . . The rationale in this respect is that any testimony before the National Commission should not be accepted as evidence before any court in implementation of Article 12 of the 1954 Law on Investigation Committee which stipulates that "any testimony given during any investigation conducted under this Law shall not be accepted as evidence before any civil or criminal court."

As regards the crimes of rape and sexual violence which received much attention in the international media, the National Commission investigated them in all the States of Darfur at various levels and heard a number of witnesses under oath, including the victims who were referred by the National Commission to the concerned medical services for medical examination. The National Commission had on hand the detailed reports of the judicial committees which visited the various areas of Darfur, including displaced persons' camps.

All these measures proved to the National Commission that rape and sexual violence crimes had been committed in the States of Darfur. They also proved that crimes had not been systematic or widespread constituting a crime against humanity as mentioned in the allegations. The National Commission also had proof that most of the rape crimes were filed against unknown persons, but investigations led to accusing a number of persons, including ten members of the regular forces. The Minister of Justice lifted their immunity and they are being tried now. Most of these crimes were committed individually in the context of the prevailing security chaos. The National Commission noticed that the word "rape," with its legal and linguistic meanings, was not known to the women of Darfur in general. They believed that the meaning of the word "rape" was to use violence to compel a person to do something against that person's will, and not specifically to rape. . . . Unfortunately, scenes of a group rape were shot and were shown outside the Sudan. Later on it was found out that they were fictitious. Some of the persons who took part in this confessed that they were given sums of money as an incitement to play roles in those scenes. . . .

Forced displacement as one of the components of ethnic cleansing, which implies forced or violent displacement of an ethnic group or a group which speaks one language or has a dominant culture, from a land on which it settled legally to another area, and which has been associated throughout history with the idea of forming the "Nation State," is a crime against humanity.

In the light of the above, the National Commission visited several areas in the Darfur States where, according to some allegations, forced displacement or ethnic cleansing was practised. The Commission interrogated the inhabitants of those areas and was ascertained that some Arab tribal groups had attack the Abram area, specifically the Meraya and Umm Shukah villages, displacing some non-Arab groups and settling in the area. However, the authorities, as reported by the Kas Locality Commissioner, initiated measures to rectify this situation and return properties to their owners. The acts of some Arab groups led to the forced displacement of those non-Arab groups. The National Commission, therefore, believes that a judicial investigation should be conducted in order to know the conditions and circumstances which led to this situation. If the forced displacement crime is proved, legal measures should be taken against these groups because this incident constitutes a serious precedent violating customary practices and triggers similar acts worsening the problem

The National Commission visited many of the villages which were burned in Kulbus, El Geneina, Wadi Saleh and Kas localities. The National Commission found most of them uninhabited which rendered it impossible for the National Commission to question their inhabitants. The National Commission found there some of the police forces which were deployed after the incidents in preparation for the voluntary return of the displaced persons. However, the information given by the Shartai and Omdahs who accompanied the National Commission, and the evidence available, indicate that all parties were responsible, under the circumstances of the blazing conflict, for the burning of the villages. The National Commission had proof that the acts of burning were the direct cause of the displacement of the villages' inhabitants of various tribes, the majority of whom were Fur, to camps, e.g. Deleig and Kalma, near safe areas where the various services were available. Accordingly, the Commission believes that, with the exception of the above incident concerning which the Commission recommended that an investigation be conducted, the forced displacement crime was not proved.

The incidents which occurred led to the displacement of big numbers of citizens. Citizens were terrified and frightened. This situation caused many citizens to leave their villages and go to the camps. The National Commission had proof that the Darfur tribes, regardless of their ethnic origin, hosted the displaced persons seeking accommodation and that no tribe settled by force in the quarters of another tribe. This was confirmed by the Nazer of Albani Helba and the Nazer of Al Habania. . . ."

460. In its recommendations, the National Commission suggested administrative and judicial measures, in particular that the causes of the conflict "should be studied and the administrative deficiency, which was one of the factors worsening the conflict, should be rectified." It further recommended that judicial investigation committees concerned with the following items be established:

- a. Allegations of extrajudicial executions at Deleig and Tenko, because there are evidences which the National Commission believes should be subject of a detailed judicial investigation leading to trial of the persons proven to have committed the acts they are accused of, particularly as there are accusations against certain persons.

- b. Allegations that some Arab groups captured two villages of the Fur tribe in Kas Locality. The Commission knew that an administrative investigation was being conducted by a committee established by the Wali of the South Darfur State in view of the seriousness of the accusation and its consequences which necessitate acceleration of the relevant measures.
 - c. Investigating the incidents of Buram, Meleit and Kulbus, i.e. killing wounded persons in the hospitals and burning some of them alive, and taking the necessary action against perpetrators, particularly as certain names known to citizens were mentioned in the testimonies of witnesses.
461. To summarise, the Executive Summary states that serious violations of human rights were committed in the three Darfur States. All parties to the conflict were involved. What happened did not constitute genocide. Numbers of persons killed were exaggerated: losses of life incurred by all parties, including the armed forces and police, did not exceed a few thousands. Rape and crimes of sexual violence were committed but were not widespread or systematic to amount to a crime against humanity. The National Commission recommends judicial investigations into some specific incidents and a setting up of a judicial committee to investigate property losses.
462. The Commission finds that while it is important for the National Commission to acknowledge some wrong-doings, its findings and recommendations are insufficient and inappropriate to address the gravity of the situation. Simply put, they provide too little too late. The massive scale of alleged crimes committed in Darfur is hardly captured by the report of the National Commission. As a result, the report attempts to justify the violations rather than seeking effective measures to address them. While this is disappointing particularly to the victims of these violations, the Commission is not taken by surprise by the tone and content of the report. The Commission is aware that the National Commission was under enormous pressure to present a view that is close to the Government's version of events. The report of the National Commission provides a glaring example of why it is impossible under the current circumstances in Sudan for a national body to provide an impartial account of the situation in Darfur, let alone recommend effective measures.

(ii.) The Parliamentary Committee of Inquiry

463. A parliamentary committee to enhance peace, security and development in the Darfur States was established in accordance with National Assembly resolution 38 of December 2003, with a membership of some 59 people. It was to meet with responsible authorities, executive bodies and other relevant personalities, as well as interview parties to the conflict. Its findings, inter alia, expressed concerns in relation to under-development in Darfur and contained recommendation to improve the conditions for the IDPs.
464. The committee made recommendations in the areas of security, humanitarian aid, social structure enhancement, services and development, opening up of police posts with adequate logistics for speedy response to crises and

seizure of arms in the wrong hands. To date, there has been no indication of the government complying with the recommendations of the Parliamentary Committee to improve the conditions of the IDPs, to develop social structure and generally improve services in Darfur, nor compliance with its recommendation to seize arms in the wrong hands. Seizure of arms would naturally mean seizure from the SLA and JEM as well as the Janjaweed, who had otherwise been given Government support.

(iii.) The committees against rape

465. In the Joint Communiqué issued by the Government and the United Nations during the visit of the United Nations Secretary-General on 3 July, 2004, on the situation in Darfur, the Government of the Sudan committed to undertake concrete measures to end impunity for human rights violations in the region. Towards this end, the Government had undertaken to immediately investigate all cases of violations, including those brought to its attention by the United Nations, AU, and other sources.
466. Allegations of rape and other incidents of sexual abuse of women were prominent amongst the serious violations of human rights in the region reported by multiple sources. The Minister of Justice, under powers vested in him by Section 3 (2) of the Commissions of Inquiry Act, 1954, issued a decree on 28 July 2004, establishing separate Rape Committees for the three Darfur states, North, South and West Darfur.
467. The Committees were composed of three members each, comprising a judge of the Appeal Court as the Chair, a legal counsel from the Ministry of Justice and a police officer. All members of the Committees were women.
468. The mandate of the Committees was “to investigate the crimes of rape in the three states of Darfur.” The Committees were delegated the powers of the office of the district prosecutor to carry out their mandate.¹⁶⁷ The Committees were required to report to the Minister of Justice within two weeks of the commencement of their work.
469. Before commenting on the working of the Committees, the inadequacies of the mandate need to be addressed. The mandate of the rape Committees was too narrow to address the serious allegations of violence against women. Reports of abuse suffered by women include, but are not limited to rape.¹⁶⁸ Excluding other forms of sexual abuse from the scope of the inquiry left a vast number of allegations unaddressed. Further, means of redress and reparation for the victims was not brought within the scope of the mandate.

¹⁶⁷ Article 20 of the Criminal Procedure Act, 1991 empowers the Minister of Justice to grant the powers of the office of the Prosecution Attorney to any person or Commission whenever he deems it to be in the interest of justice. Under Article 19 of the Criminal Procedure Act, 1991, the office of the Prosecution Attorney has the powers to direct the investigation in a criminal complaint, to frame charges, to file prosecutions and to supervise the progress of the case in the court.

¹⁶⁸ Give figures on incidents of sexual violence from section on rape in Section 1 of the report.

This limited the effectiveness of the initiative in providing comprehensive justice to victims. International law not only requires States to address violations of human rights and take measures to prevent their occurrence, but also imposes the obligation to provide an effective remedy for violations.¹⁶⁹

470. The Committees were not given any guidelines to ensure that methods of investigation were suited to the objective of ending impunity and facilitating the victims in reporting the crimes committed against them. The Sudan Criminal Act and the Criminal Procedure Act do not contain substantive and procedural provisions that can be applied to the special situation of crimes committed during an armed conflict. The absence of such guidelines, including the determination of criteria for selection of cases for investigation and prosecution, left the Committees without guidance as to the proper methods for investigating crimes constituting serious violations of human rights. This omission on the part of the Ministry of Justice affected the work of the Committees and their ability to achieve their objectives.
471. The time allotted to the Committees within which to carry out their work was grossly inadequate considering the immensity of the task. This indicates a lack of any serious commitment on the part of the Government to investigate the allegations of widespread rape and to end impunity for this crime.
472. During its first mission to Sudan the Commission met the Chairpersons and members of the three rape committees in Khartoum. The Commission thanks the Government for allowing this opportunity and to the members of the Committees for making themselves available for the two meetings with the Commission.
473. Members of the Commission were told that the Committees began their work in the states under their respective jurisdiction on 11 August 2004. All the three committees adopted a common methodology. The establishment of the Committees and their arrival in the different states was announced publicly through the electronic media. The Committees arranged for this announcement to be made in all the IDP camps in the province and visited the camps to receive complaints of rape. They also visited police stations and the office of the district attorney in order to obtain information on any cases of rape already registered.
474. In the camps the Committees met with the managers of the camp and the tribal and local leaders of the population residing in the camp. Small committees were constituted in each of the camps they visited to explain the mandate of the Committees and to elicit information from the IDPs.
475. During the course of the Rape Committees' work, a decree was issued by the Minister of Justice on 21 August, 2004, removing the requirement of registering a complaint of rape with the police before the victim could be medically examined or receive any medical treatment.
476. It is evident from their accounts that the Committees received only a few complaints. Many of the cases they processed were already registered in the

¹⁶⁹ Article 2 of the ICCPR. Sudan is a party to the Covenant.

police stations before their arrival, or occurred during the period that they were conducting their inquiry in the respective provinces. The approach adopted by the Committees in proceeding with the inquiry, as explained by the three Chairpersons, was to hear a complaint, interrogate the victim to ascertain if the elements of the crime of rape as defined in the Criminal Act, 1991, were present,¹⁷⁰ and then require the victim to be medically examined. If the medical report corroborated the victim's allegations the case would be sent to the police for further investigation. In cases where the perpetrators were unnamed or unknown, no further investigation was conducted. Where such corroboration was available, and the perpetrator/s was identified by the victim the cases were recommended for prosecution and sent to the office of the district prosecutor.

477. The Chairpersons of the Committees informed the Commission that in North Darfur the Committee did not process any case in which it had received the complaint directly. This Committee had completed investigation of 8 cases and sent these to the prosecutor for further action. In West Darfur three cases were registered by the Committee on direct complaints from victims. These, together with other cases (already registered with the police before the Committee started work) investigated by the Committee were sent to the prosecutor. In South Darfur the Committee investigated cases that had already been registered at the police station in Nyala. The Chairpersons did not remember the total number of cases investigated by the Committees in West and South Darfur. The members of the Committees had no documents giving the details of the cases.
478. The Advisory Council on Human Rights handed a document to the Commission in which it is stated that the three investigation committees had ended a three week visit to the region and had submitted their interim report to the Minister of Justice in September. Together the committees had registered 50 cases, 29 in West, 10 in North and 11 in south Darfur. Of these 35 were against unknown perpetrators. There is no information on how many of the identified accused in cases investigated by the Committees were prosecuted or convicted. Details of the cases were also not made available to the Commission. Information on action taken to end impunity, provided by the ACHR lists 7 cases of rape in which the accused were arrested and tried; one case in which 13 accused were tried and convicted for producing fake video implicating the military in the commission of rape; two cases in which the district prosecutor, on reports made by United Nations monitors, visited IDP camps and recorded statements of victims and initiated proceedings; and one case of abduction and rape was registered against unknown armed opposition groups.
479. The Commission was made aware of the difficulties that the Rape Committees confronted in implementing their mandate and the severe constraints

¹⁷⁰ Article 145 (2) of the Criminal Act, 1991 makes "penetration" essential to constitute the act of "sexual intercourse." Article 149 defines rape as an act of sexual intercourse committed on another person without her/his consent. Where the victim is in the custody or under the authority of the offender, consent shall not be relevant.

they experienced because of the lack of resources and technical assistance. However, the approach adopted by the Committees in conducting their work could not be conducive to achieving the objectives for which they were established. The Committees failed to give due consideration to the context in which they were working and to adopt an approach suitable to the circumstances. The incidents of rape they were called upon to investigate had occurred over a period of eighteen months, and the affected population had been displaced, probably more than once. All the Committees admitted having received complaints of rape which occurred during attacks on villages. None of these complaints was recorded or investigated. The reasons given for not taking action on such cases were non-production of victims before the Committee, absence of witnesses and failure of victims to present themselves for a medical examination, or to produce a report of any earlier examination by a competent authority.

480. The Committees placed undue burden on the affected population to produce evidence and did not exercise their powers to activate relevant authorities to investigate in order to overcome the gaps in information made available by victims and witnesses. The reliance on medical evidence, for instance, to initiate investigation seems highly misplaced when a majority of the complaints pertained to rape that had occurred some time back, or where the victim was a married woman.
481. The lack of sufficient commitment to achieving their goals is apparent in several aspects of the Committees' work. The first indication of the Committees failure is the lack of public response to their invitation to bring complaints. The Commission has personally received several accounts from victims in IDP camps alleging rape and other forms of sexual abuse suffered by women during attacks on their villages, while fleeing the villages and, more recently, around the camps where they have taken shelter.¹⁷¹ The fact that people were generally hesitant to approach the Committees with their complaints indicates a lack of trust in the Government.
482. The Committees could not mitigate this distrust by adopting an approach that inspired more confidence in their ability to provide redress to the victims. Those who did approach the Committees with complaints or information on rape did not receive a response that would encourage them to believe in a meaningful outcome of the investigation. In many of the cases they did not find sufficient merit in the complaint to proceed any further. Others were considered too short on evidence to proceed with the investigation. Several of the complaints they heard were against unknown persons. Some complaints were registered with the police, but many were not registered because the complainants became disinterested when they heard that these complaints could not be pursued because of the lack of identification of an accused or a suspect.
483. The Committees rejected too many cases for the reason that their interrogation of the victims revealed that the crime complained of did not amount to rape, as

¹⁷¹ Reference to cases in the Section on rape collected during COI mission.

penetration had not occurred or that the complainants had confused the Arabic term for oppression with the term for rape and had mistakenly come forward with complaints of other forms of abuse or violence, such as beatings.

484. In their discussions with the Commission on the methodology of the Rape Committees, the wide publicity of the mandate of the Committees was greatly emphasized. In addition small committees were said to have been constituted in the camps to explain the purpose of the investigation to the affected population. In view of this the presumption that women were confused and that their complaint was not that of rape is not understandable. From its own experience of interviews with victims and witnesses, the Commission does not find this explanation convincing. Women, who had given accounts to the Commission of violence committed upon them, could fully understand the nature of the abuse that they had suffered, including rape.
485. It is disappointing that the Committees confined themselves to the crime of rape and did not process cases in which other forms of sexual abuse, including attempt to rape, were reported. The Committees lost a valuable opportunity of gathering important information on crimes committed against women by failing to record the information brought to its attention and confining the registration of cases only to those complaints which, in their assessment, could be further investigated.
486. The Committees were delegated the powers to direct investigations, frame charges, file prosecutions and to supervise the progress of cases in the court. The Committees limited their task only to receiving complaints and to sending the cases for further investigations to the police. Where the police did not pursue the investigation the Committees took no action. In cases that they recommended for prosecution the Committees had no information if these cases were filed or if these had resulted in conviction. They ended their work in three weeks and presented their reports to the Ministry of Justice through the Advisory Council on Human Rights. There was no involvement of the Committees in any follow-up to their reports. They had not received any comments on their reports from the ministry nor were they involved in any follow-up to their reports.
487. If the intention of the Government was to end impunity and to establish a mechanism for facilitating victims in reporting crime of rape with a view to ensuring that perpetrators are held accountable, the initiative was poorly designed and lacked the potential for achieving this objective. The Government created the Committees as an immediate measure, but failed to make them effective or of any remedial value to the victims. An appraisal of the working methodology of the Committees and the details of the work received from the Chairpersons reveals several lacunas. The Commission can not agree with the Government's position that the statistics representing the work of the Committees indicate a much lower incidence of the crime of rape than is reported by sources such as the United Nations, AU and other national and international organizations. The work of the Rape Committees does not provide a sound basis for any conclusions with regard to the incidence of rape in Darfur nor does it satisfy the requirement of state responsibility to investigate cases of serious violations of human rights and of accountability of those responsible.

VII. Action by The Rebels to Remedy The Violations They Committed

488. Both the Government and the rebels themselves have reported to the Commission that the rebels have taken no action whatsoever to investigate and repress the international crimes committed by their members. The justifications offered by the rebels for such failure is either that no such crimes have been perpetrated, or else that they may have been committed by members of military units who were acting on their own and outside or beyond the instructions given by the political and military leaders.

SECTION II: HAVE ACTS OF GENOCIDE OCCURRED?

I. The Notion of Genocide

489. The second task assigned to the Commission is that of establishing whether the crimes allegedly perpetrated in Darfur may be characterized as acts of genocide, or whether they instead fall under other categories of international crimes.
490. As stated above, the Genocide Convention of 1948 and the corresponding customary international rules require a number of specific objective and subjective elements for individual criminal responsibility for genocide to arise. The objective element is twofold. The first, relating to the *prohibited conduct*, is as follows: (i) the offence must take the form of (a) killing, or (b) causing serious bodily or mental harm, or (c) inflicting on a group conditions of life calculated to bring about its physical destruction; or (d) imposing measures intended to prevent birth within the group, or (e) forcibly transferring children of the group to another group. The second objective element relates to the *targeted group*, which must be a "national, ethnical, racial or religious group." Genocide can be charged when the prohibited conduct referred to above is taken against one of these groups or *members* of such group.
491. Also the subjective element or *mens rea* is twofold: (a) the criminal intent required for the underlying offence (killing, causing serious bodily or mental harm, etc.) and, (b) "the intent to destroy, in whole or in part" the group as such. This second intent is an aggravated criminal intention or *dolus specialis*: it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such.
492. As clarified by international case law, the intent to destroy a group "in part" requires the intention to destroy "a considerable number of individuals"¹⁷² or "a substantial part,"¹⁷³ but not necessarily a "very important part"¹⁷⁴ of

¹⁷²See *Kayishema and Ruzindana* (ICTR, Trial Chamber, 21 May 1999), at § 97.

¹⁷³See *Jelisić* (ICTY Trial Chamber, 14 December 1999, at §§ 82), *Bagilishema* (ICTR, Trial Chamber, 7 June 2001, at § 64) and *Semanza* (ICTR, Trial Chamber, 15 May 2003, at § 316.

¹⁷⁴See *Jelisić* (ICTY, Trial Chamber, 14 December 1999), at §§ 81–2.

the group.¹⁷⁵ Instances mentioned in either case law or the legal literature include, for example, the intent to kill all Muslims of Bosnia-Herzegovina, or all Muslims living in a region of that country,¹⁷⁶ or, for example, to destroy all the Jews living in Italy or the Armenians living in France.¹⁷⁷

493. Of course, this special intent must not be confused with motive, namely the particular reason that may induce a person to engage in criminal conduct. For instance, in the case of genocide a person intending to murder a set of persons belonging to a protected group, with the specific intent of destroying the group (in whole or in part), may be motivated, for example, by the desire to appropriate the goods belonging to that group or set of persons, or by the urge to take revenge for prior attacks by members of that groups, or by the desire to please his superiors who despise that group. From the viewpoint of criminal law, what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group.¹⁷⁸
494. *The definition of protected groups.* While they specify the classes of prohibited conduct, international rules on genocide use a broad and loose terminology when indicating the various groups against which one can engage in acts of genocide, including references to notions that may overlap (for instance, “national” and “ethnic”). This terminology is criticised for referring to notions such as ‘race’, which are now universally regarded as outmoded or even fallacious. Nevertheless, the principle of interpretation of international rules whereby one should give such rules their maximum effect (principle of effectiveness, also expressed by the Latin maxim *ut res magis valeat quam pereat*) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effects. It follows that by “national groups,” one should mean those sets of individuals which have a distinctive identity in terms of nationality or of national origin. On the other hand, “racial groups” comprise those sets of individuals sharing some hereditary physical traits or characteristics. “Ethnic groups” may be

¹⁷⁵ According to B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/1985/6, at § 29, the expression “in part” indicates “a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership.” Interestingly, the United States, in its domestic legislation implementing the Genocide Convention, defined “substantial part” as “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.” (*Genocide Convention Implementation Act 1987*, sec. 1093 (8)).

¹⁷⁶ *Krstić*, (ICTY Trial Chamber), August 2, 2001, § 590: “[T]he physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.”; confirmed by the Appeals Chamber, judgement of 19 April 2004, §§ 6–23.

¹⁷⁷ “in part” is intended “to undermine pleas from criminals who argue that they did not intend the destruction of the group as a whole.” He then notes that the Turkish Government targeted in 1915 the Armenians “within its borders, not those of the Diaspora”; the Nazis intended to destroy all the Jews living in Europe; the Rwandan extremists did not intend to eliminate “Tutsi population beyond the country’s borders”.

¹⁷⁸ See e.g. *Jelisić* (Appeals Chamber), July 5, 2001, § 49.

taken to refer to sets of individuals sharing a common language, as well as common traditions or cultural heritage. The expression "religious groups" may be taken to encompass sets of individuals having the same religion, as opposed to other groups adhering to a different religion.

495. *Are tribal groups protected by international rules proscribing genocide?* In 1996 the United Nations International Law Commission in its report on the "Draft Code of Crimes Against Peace and Security of Mankind" stated that "The Commission was of the view that the present article [17 of the Draft Code] covered the prohibited acts when committed with the necessary intent against members of a *tribal group*" (p. 33, at § 9; emphasis added). According to anthropologists a "tribe" constitutes a territorial division of certain large populations, based on kinship or the belief that they descend from one ancestor: these aggregates have a chief and call themselves by one name and speak one language.¹⁷⁹
496. The aforementioned view about "tribal groups," which has remained isolated,¹⁸⁰ may be accepted on condition that the "tribal group" should also constitute a distinct "racial, national, ethnical or religious" group. In other words, tribes as such do not constitute a protected group.¹⁸¹

¹⁷⁹ See for instance L. Mair, *Primitive Government* (London, Penguin Books, 1970), pp. 7–16. Under an authoritative definition, "In its primary sense, the tribe is a community organized in terms of kinship, and its subdivisions are the intimate kindred groupings of moieties, gentes, and totem groups. Its territorial basis is rarely defined with any precision, and its institutions are typically the undifferentiated and intermittent structures of an omnifunctional social system. The leadership of the tribe is provided by the group of adult males, the lineage elders acting as tribal chiefs, the village headmen, or the shamans, or tribal magicians. These groups and individuals are the guardians of the tribal customs and of an oral tradition of law." (*The New Encyclopedia Britannica* (2003), XXV, at 1008).

¹⁸⁰ W. Schabas (*Genocide in International Law*, Cambridge, Cambridge University Press, 2000), after citing the statement of the International Law Commission, argues that "It is not difficult to understand why tribal groups fit within the four corners of the domain, whereas political and gender groups do not" (at p. 112). This proposition is not however supported by any legal argument.

¹⁸¹ That, for the purpose of the legal notion of genocide, a tribe or a group of tribes may be regarded as the target of genocide only if it also constitutes a racial, ethnic or religious group, is borne out by the ruling of the Australian Federal Court in 1999 in *Nulyarimma v. Thompson and Buzzacott v. Hill*, with regard to Aboriginal groups or tribes. Some Aboriginal persons had claimed that conduct engaged in by certain Ministers of the Commonwealth or Commonwealth parliamentarians were contributing to the destruction of the Aboriginal people as an ethnic or racial group. The Court dismissed the claim. The majority of Judges held that the legal ground for dismissal was that the legal notion of genocide could not be acted upon in the Australian legal system for lack of the necessary domestic legislation. Judge Merkel opined instead that genocide could be acted upon within the domestic legal system of Australia, although in his view *in casu* the claim was nevertheless groundless on its merits, because "cultural genocide" is not covered either by customary international law or the 1948 Convention. What is interesting for our purposes is, however, that none of the three judges held that the Aboriginals could not be legitimately held to be a target-group under the proper notion of genocide. In other words, the three Judges implicitly supported the view that Australian aboriginal tribes or units do constitute a racially and ethnically distinct group, on account of their ethnicity, religion, culture, language, and colour. According to *The Encyclopedia Britannica*, vol. 1, at pp. 714–5, and vol. 14, at pp. 434–9, the Australian aboriginal society is divided up in tribes or language-named groups based on land ownership and kinship.

497. It is apparent that the international rules on genocide are intended to protect from obliteration groups targeted not on account of their constituting a territorial unit linked by some community bonds (such as kinship, language and lineage), but only those groups—whatever their magnitude—which show the particular hallmark of sharing a religion, or racial or ethnic features, and are targeted precisely on account of their distinctiveness. In sum, tribes may fall under the notion of genocide set out in international law only if, as stated above, they also exhibit the characteristics of one of the four categories of group protected by international law.
498. *The question of genocidal acts against groups that do not perfectly match the definitions of the four above mentioned groups.* The genocide perpetrated in 1994 in Rwanda vividly showed the limitations of current international rules on genocide and obliged the Judges of the ICTR to place an innovative interpretation on those rules. The fact is that the Tutsi and the Hutu do not constitute at first glance distinct ethnic, racial religious or national groups. They have the same language, culture and religion, as well as basically the same physical traits. In *Akayesu* the ICTR Trial Chamber emphasized that the two groups were nevertheless distinct because (i) they had been made distinct by the Belgian colonizers when they established a system of identity cards differentiating between the two groups (§ 702), and (ii) the distinction was confirmed by the self-perception of the members of each group. As the Trials Chamber pointed out, “all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity” (*ibidem*). The Trial Chamber also insisted on the fact that what was required by the international rules on genocide was that the targeted group be “a stable and permanent group”, “constituted in a permanent fashion and membership of which is determined by birth,” and be identifiable as such (§§ 511 and 702). The objective criterion of a “stable and permanent group,” which, if considered *per se*, could be held to be rather questionable, was supplemented in the ICTR case law (and subsequently in that of the ICTY) by the subjective standard of perception and self-perception as a member of a group.¹⁸² According to this case law, in case of doubt one should also establish whether (i) a set of persons are perceived and in fact treated as belonging to one of the protected groups, and in addition (ii) they consider themselves as belonging to one of such groups.¹⁸³

¹⁸² See *Kayishema and Ruzindana*, § 98, *Musema*, at § 161, *Rutaganda*, § 56, as well as, before the ICTY, *Jelisić* (Trial Chamber), at §§70-71 and *Krstić* (Trial Chamber), at §§ 556-7 and 559-60).

¹⁸³ In *Kayishema and Ruzindana* the subjective test was only held to be applicable to the notion of ethnic group (“An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or a group identified as such by others, including perpetrators of crimes (identification by others)”; at § 98). The subjective test was instead considered applicable to any group protected by the Convention (and customary law) by the ICTY Trial Chamber in *Jelisić* (at §§ 70-71: “A group may be stigmatised [...] by way of positive or negative criteria. A “positive approach” would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A “negative approach”

499. In short, the approach taken to determine whether a group is a (fully) protected one has evolved from an objective to a subjective standard to take into account that "collective identities, and in particular ethnicity, are by their very nature social constructs, "imagined" identities entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomena or physical facts."¹⁸⁴
500. It would seem that the subjective test may usefully supplement and develop, or at least elaborate upon the standard laid down in the 1948 Convention and the corresponding customary rules on genocide. Indeed, the criteria initially used by courts to interpret and apply those treaty provisions and customary rules have proved either too loose or too rigid; in short, they were unable to take account of situations where manifestly there existed a stark opposition and conflict between two distinct sets of persons, one of which carried out the *actus reus* typical of genocide with the intent to destroy the other in whole or in part. Moreover, it would be erroneous to underestimate one crucial factor: the process of formation of a perception and self-perception of another group as distinct (on ethnic, or national, or religious or racial ground). While on historical and social grounds this may begin as a subjective view, as a way of regarding the others as making up a different and opposed group, it gradually hardens and crystallizes into a real and factual opposition. It thus leads to an objective contrast. The conflict, thus, from subjective becomes objective. It ultimately brings about the formation of two conflicting groups, one of them intent on destroying the other.
501. What matters from a legal point of view is the fact that the interpretative expansion of one of the elements of the notion of genocide (the concept of protected group) by the two International Criminal Tribunals is in line with the object and scope of the rules on genocide (to protect from deliberate annihilation essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Convention and the corresponding customary rules). In addition, this expansive interpretation does not substantially depart from the text of the Genocide Convention and the corresponding customary rules, because it too hinges on four categories of groups which, however, are no longer identified only by their objective connotations but also on the basis of the subjective perceptions of members of groups. Finally, and perhaps more importantly, this broad interpretation has not been challenged by States. It may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law.
502. *Proof of genocidal intent.* Whenever direct evidence of genocidal intent is lacking, as is mostly the case, this intent can be inferred from many acts

would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group."), as well as by an ICTR Trial Chamber in *Musema* (at § 161), and *Rutaganda* (at § 56).

¹⁸⁴ G. Verdירה, "The Genocide Definition in the jurisprudence of the *ad hoc* tribunals," 49 *International and Comparative Law Quarterly* (2000), at 592.

and manifestations or factual circumstances.¹⁸⁵ In *Jelisić* the Appeals Chamber noted that “as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts” (§ 47).

503. Courts and other bodies charged with establishing whether genocide has occurred must however be very careful in the determination of the subjective intent. As the ICTY Appeals Chamber rightly put it in *Krstić* (*Appeal*), “Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirements of specific intent. Convictions for genocide can be entered only where intent has been unequivocally established” (Judgment of 19 April 2004, at § 134). On this ground the Appeals Chamber, finding that the Trial Chamber had erred in demonstrating that the accused possessed the genocidal intent, reversed the Trial Chamber’s conviction of genocide and sentenced Krstić for complicity in genocide.
504. Similarly, States have shown caution when defining genocidal intent with regard to particular events, as is shown, for instance, by the position the Canadian authorities took in 1999 with regard to the question of mass killing of Kosovar Albanians by the armed forces of the central authorities of the Federal Republic of Yugoslavia (FRY) in the internal armed conflict between Kosovo and the Government of the FRY.¹⁸⁶

¹⁸⁵ See *Jelisić* (Appeals Chamber), at § 47; *Rutaganda* (Appeals Chamber), at § 528; *Krstić* (Appeals Chamber), at § 34. A number of factors from which intent may be inferred were mentioned in *Akayesu* (§§523-4: “the general context of the perpetration of other culpable acts systematically directed against that same group, whether . . . committed by the same offender or by others”; “the scale of atrocities committed”; the “general nature” of the atrocities committed “in a region or a country”; “the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups”; “the general political doctrine which gave rise to the acts”; “the repetition of destructive and discriminatory acts” or “the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list. . . but which are committed as part of the same pattern of conduct.”), in *Musema* (§ 166) as well as *Kayishema and Ruzindana* (§§ 93 and 527: “the number of group members affected”; “the physical targeting of the group or their property”; “the use of derogatory language toward members of the targeted group”; “the weapons employed and the extent of bodily injury”; “the methodical way of planning”; “the systematic manner of killing” and “the relative proportionate scale of the actual or attempted destruction of a group.”).

¹⁸⁶ In a Memorandum of 30 March 1999, the Legal Bureau of the Canadian Department of Foreign Affairs pointed out first that in the case of the Kosovar Albanians one element of genocide was present (“targeting a group on the basis of ethnicity”). Then, after noting that so-called ethnic cleansing has been expressly excluded from the Genocide Convention in the 1948 negotiations, it pointed out that such notion (namely the forcible expulsion of person from their homes in order to escape the threat of subsequent ill-treatment), showed an intent different from the “intent to destroy”. It went on to note that “Ethnic Albanians are being killed and injured in order to drive them from their homes, not in order to destroy them as a group, in whole or in part” (in *37 Canadian Yearbook of International Law* 1999, at 328; emphasis in the original).

505. *Is genocide graver than other international crimes?* It has widely been held that genocide is the most serious international crime. In *Kambanda* (§ 16) and *Serushago* (§15) the ICTR defined it as “the crime of crimes” (but see below). In *Krstić* the ICTY Appeals Chamber stated that “Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.” (§36).
506. It is indisputable that genocide bears a special stigma, for it is aimed at the *physical obliteration* of human groups. However, one should not be blind to the fact that some categories of crimes against humanity may be similarly heinous and carry a similarly grave stigma. In fact, the Appeals Chamber of the ICTR reversed the view that genocide was the “crime of crimes.” In *Kayishema and Ruyindana*, the accused alleged “that the Trial Chamber erred in finding that genocide is the “crime of crimes” because there is no such hierarchical gradation of crimes.” The Appeals Chamber agreed: “The Appeals Chamber remarks that there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are “serious violations of international humanitarian law,” capable of attracting the same sentence” (§ 367).¹⁸⁷

II. Do The Crimes Perpetrated in Darfur Constitute Acts of Genocide?

507. *General.* There is no doubt that some of the objective elements of genocide materialized in Darfur. As discussed above, the Commission has collected substantial and reliable material which tends to show the occurrence of systematic killing of civilians belonging to particular tribes, of large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part (for example by systematically destroying their villages and crops, by expelling them from their homes, and by looting their cattle). However, two other constitutive elements of genocide require a more in depth analysis, namely whether (a) the target groups amount to one of the group protected by international law, and if so (b) whether the crimes were committed with a genocidal intent. These elements are considered separately below.

¹⁸⁷ Note however that the Appeals Chamber concluded that the Trial Chamber had made no reversible error: “The Appeals Chamber finds that the Trial Chamber’s description of genocide as the “crime of crimes” was at the level of general appreciation, and did not impact on the sentence it imposed.” (§ 367). See also *Semanya*, ICTR Trial Chamber, § 555.

508. *Do members of the tribes victims of attacks and killing make up objectively a protected group?* The various tribes that have been the object of attacks and killings (chiefly the Fur, Massalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim).¹⁸⁸ In addition, also due to the high measure of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them. Furthermore, inter-marriage and coexistence in both social and economic terms, have over the years tended to blur the distinction between the groups. Apparently, the sedentary and nomadic character of the groups constitutes one of the main distinctions between them. It is also notable that members of the African tribes speak their own dialect in addition to Arabic, while members of Arab tribes only speak Arabic.
509. *If not, may one hold that they subjectively make up distinct groups?* If objectively the two sets of persons at issue do not make up two distinct protected groups, the question arises as to whether they may nevertheless be regarded as such subjectively, in that they perceive each other and themselves as constituting distinct groups.
510. As noted above, in recent years the perception of differences has heightened and has extended to distinctions that were earlier not the predominant basis for identity. The rift between tribes, and the political polarization around the rebel opposition to the central authorities, has extended itself to issues of identity. Those tribes in Darfur who support rebels have increasingly come to be identified as "African" and those supporting the government as the "Arabs." A good example to illustrate this is that of the Gimmer, a pro-government African tribe and how it is seen by the African tribes opposed to the government as having been "Arabized." Clearly, not all "African" tribes support the rebels and not all "Arab" tribes support the Government. Some "Arab" tribes appear to be either neutral or even support the rebels. Other measures contributing to a polarization of the two groups include the 1987–1989 conflict over access to grazing lands and water sources between nomads of Arab origin and the sedentary Fur. The Arab-African divide has also been fanned by the growing insistence on such divide in some circles and in the media. All this has contributed to the consolidation of the contrast and gradually created a marked polarisation in the perception and self-perception of the groups concerned. At least those most affected by the conditions explained above, including those directly affected by the conflict, have come to perceive themselves as either "African" or "Arab."
511. There are other elements that tend to show a self-perception of two distinct groups. In many cases militias attacking "African" villages tend to use derogatory epithets, such as "slaves," "blacks," *Nuba*," or *Zurga*" that might imply a perception of the victims as members of a distinct group. However, in numerous other instances they use derogatory language that is

¹⁸⁸ See section above, 'Historical and social background. . .'

not linked to ethnicity or race.¹⁸⁹ As for the victims, they often refer to their attackers as *Janjaweed*, a derogatory term that normally designates “a man (a devil) with a gun on a horse.” However, in this case the term *Janjaweed* clearly refers to “militias of Arab tribes on horseback or on camelback.” In other words, the victims perceive the attackers as persons belonging to another and hostile group.

512. For these reasons it may be considered that the tribes who were victims of attacks and killings subjectively make up a protected group.
513. *Was there a genocidal intent?* Some elements emerging from the facts including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent. However, there are other more indicative elements that show the lack of genocidal intent. The fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men, is an important element. A telling example is the attack of 22 January 2004 on Wadi Saleh, a group of 25 villages inhabited by about 11 000 Fur. According to credible accounts of eye witnesses questioned by the Commission, after occupying the villages the Government Commissioner and the leader of the Arab militias that had participated in the attack and burning, gathered all those who had survived or had not managed to escape into a large area. Using a microphone they selected 15 persons (whose name they read from a written list), as well as 7 *omdas*, and executed them on the spot. They then sent all elderly men, all boys, many men and all women to a nearby village, where they held them for some time, whereas they executed 205 young villagers, who they asserted were rebels (*Torabora*). According to male witnesses interviewed by the Commission and who were among the survivors, about 800 persons were not killed (most young men of those spared by the attackers were detained for some time in the Mukjar prison).

¹⁸⁹ Epithets that eyewitnesses or victims reported to the Commission include the following: “This is your end. The Government armed me.” “You are Massalit, why do you come here, why do you take our grass? You will not take anything today.” “You will not stay in this country.” Destroy the *Torabora*.” “You are Zaghawa tribes, you are slaves.” “Where are your fathers, we would like to shoot and kill them.” “Take your cattle, go away and leave the village.” In an attack of 1 November 2003 on the village of Bir-Saliba (in the region of Sirba, Kulbus), a witness heard the attackers yell “Allah Akbar, we are going to evict you Nyanya” and explained that “Nyanya” in their dialect is the name of the poison used to kill insects (however, probably this derogatory term was also used as a reference to the rebel organization in the South that existed before the establishment of the SPLA, and was called NYANYA). During rape: “You are the mother of the people who are killing our people.” “Do not cut the grass because the camels use it.” “You sons of *Torabora* we are going to kill you.” “You do not have the right to be educated and must be *Torabora*” (to an 18-year-old-student of a boarding school); “You are not allowed to take this money to fathers that are real *Torabora*” (to a girl from whom the soldier that raped her also took all her money); “You are very cheap people, you have to be killed.”

514. This case clearly shows that the intent of the attackers was not to destroy an ethnic group as such, or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population.
515. Another element that tends to show the Sudanese Government's lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in IDP camps. In other words, the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Sudanese Government may be held to be in breach of international legal standards on human rights and international criminal law rules, it is not indicative of any intent to annihilate the group. This is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong. Suffice it to note that the Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance (construction of hospitals, cooking facilities, latrines, etc.)
516. Another element that tends to show the lack of genocidal intent is the fact that in contrast with other instances described above, in a number of instances villages with a mixed composition (African and Arab tribes) have not been attacked. This for instance holds true for the village of Abaata (north-east of Zelingi, in Western Darfur), consisting of Zaghawa and members of Arab tribes.
517. Furthermore, it has been reported by a reliable source that one inhabitant of the Jabir Village (situated about 150 km from Abu Shouk Camp) was among the victims of an attack carried out by Janjaweed on 16 March 2004 on the village. He stated that he did not resist when the attackers took 200 camels from him, although they beat him up with the butt of their guns. Instead, prior to his beating, his young brother, who possessed only one camel, had resisted when the attackers had tried to take his camel, and had been shot dead. Clearly, in this instance the special intent to kill a member of a group to *destroy the group as such* was lacking, the murder being only motivated by the desire to appropriate cattle belonging to the inhabitants of the village. Irrespective of the motive, had the attackers' intent been to annihilate the group, they would not have spared one of the brothers.
518. *Conclusion.* On the basis of the above observations, the Commission concludes that the Government of Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are: first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments

have led to the perception and self-perception of members of African tribes and members of Arab tribes as making up two distinct ethnic groups. However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

519. However, as pointed out above, the Government also entertained the intent to drive a particular group out of an area on persecutory and discriminatory grounds for political reasons. In the case of Darfur this discriminatory and persecutory intent may be found, on many occasions, in some Arab militias, as well as in the central Government: the systematic attacks on villages inhabited by civilians (or mostly by civilians) belonging to some "African" tribes (Fur, Masaalit and Zaghawa), the systematic destruction and burning down of these villages, as well as the forced displacement of civilians from those villages attest to a manifestly persecutory intent. In this respect, in addition to *murder* as a crime against humanity, the Government may be held responsible for *persecution as a crime against humanity*. This would not affect the conclusion of the Commission that the Government of Sudan has not pursued the policy of genocide in Darfur.
520. One should not rule out the possibility that in some instances *single individuals*, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group.¹⁹⁰ If any single individual, including Governmental officials, has such intent, it would be for a competent court to make such a determination on a case by case basis. Should the competent court determine that in some instances certain individuals pursued the genocidal intent, the question would arise of establishing any possible criminal responsibility of senior officials either for complicity in genocide or for failure to investigate, or repress and punish such possible acts of genocide.
521. Similarly, it would be for a competent court to determine whether some individual members of the militias supported by the Government, or even single Government officials, pursued a policy of *extermination* as a crime against humanity, or whether murder of civilians was so widespread and systematic as to acquire the legal features proper to *extermination* as a crime against humanity.
522. The above conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or though the

¹⁹⁰ As the ICTR Appeals Chamber rightly noted in *Kayishema and Ruzindana*, "genocide is not a crime that can only be committed by certain categories of persons. As evidenced by history, it is a crime which has been committed by the low-level executioner and the high-level planner or instigator alike." (at § 170).

militias under their control, should not be taken as in any way detracting from, or belittling, the gravity of the crimes perpetrated in that region. As stated above genocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide*. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished.

SECTION III: IDENTIFICATION OF THE POSSIBLE PERPETRATORS OF INTERNATIONAL CRIMES

I. General

523. The Commission has satisfied itself, on the basis of credible probative information which it has collected or has been rendered to it, and which is consistent with reports from various reliable sources, that a number of persons may be suspected to bear responsibility for crimes committed in Darfur. Although the heads of responsibility may vary, the probative elements (both documentary and testimonial) the Commission has gathered are sufficient to indicate a number of persons as possibly responsible for those crimes.
524. As mentioned earlier in this report, to “identify perpetrators,” the Commission has decided that the most appropriate standard was that of requiring “*a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.*” The Commission does not therefore make final judgments as to criminal *guilt*; rather, it makes an assessment of possible suspects that will pave the way for future investigations, and possible indictments, by a prosecutor, and convictions by a court of law.
525. The Commission has however decided to withhold the names of these persons from the public domain. It will instead list them in a sealed file that will be placed in the custody of the United Nations Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor (the ICC Prosecutor, according to the Commission’s recommendations), who will use that material as he or she deems fit for his or her investigations. A distinct and voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor.
526. The decision to keep confidential the names of the persons who may be suspected to be responsible for international crimes in Darfur is based on three main grounds. First, it would be contrary to elementary principles of due process or fair trial to make the names of these individuals public. In this connection, it bears emphasizing Article 14 of the ICCPR and Article 55 (2)

of the ICC Statute,¹⁹¹ which concern the rights of persons under investigation and which may be reasonably held to codify customary international law. These rights include the right to be informed that there are grounds to believe that the person has committed a crime, the right to remain silent and to have legal assistance. The publication of the names would be done without granting the possible perpetrators the fundamental rights that any suspect must enjoy.

527. The aforementioned ground for withholding the names of the persons suspected responsible is particularly valid considering that the situation in Darfur is currently subject to intense scrutiny by the international community. Were the Commission to name those persons, the world media might indeed be inclined to jump to conclusions and hold that such persons were outright guilty, and not simply suspected of bearing responsibility.
528. The second and related ground for which the Commission deems it indispensable to withhold names is linked to the nature of the mission discharged by the Commission. As pointed out above, the Commission has not been vested with prosecutorial or investigative functions proper. It has therefore confined itself to collecting reliable information about the persons that might be suspected to be responsible for crimes in Darfur. Most of the persons the Commission has interviewed took part on the basis of assurances of confidentiality. The Commission therefore did not take signed witness statements, but rather made careful accounts of the testimony given by witnesses. In addition to witness accounts, it collected police reports, judicial decisions, hospital records, etc. It also made crime scene verification (checking for consistency with witness version, photographing and mapping, and assessing located grave sites). The Commission has thus gathered information that allows it to take a first step in the direction of ensuring accountability for the crimes committed in Darfur, by pointing to the appropriate prosecutorial and judicial authorities those who deserve thorough investigation. However, the information it has gathered would be misused if names were to be published, as this could lead to premature judgements

¹⁹¹ "Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have [in addition to the rights enumerated in Article 55(1)] the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it;

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

about criminal guilt that would not only be unfair to the suspect, but would also jeopardize the entire process undertaken to fight impunity.

529. The third ground for confidentiality is the need to protect witnesses heard by the Commission (as well as prospective witnesses). In many instances it would not be difficult for those who may be suspected of bearing responsibility to identify witnesses who have spoken to the Commission, and intimidate, harass or even kill those witnesses. It is for this reason that not only the name of the possible perpetrator will be withheld, but also the list of witnesses questioned by the Commission, as well as other reliable sources of probative material. These will be included in the sealed file, which, as stated above, shall only be handed over to the Prosecutor.
530. To render any discussion on perpetrators intelligible, two legal tools are necessary: the *categories of crimes* for which they may be suspected to be responsible, and the enumeration of the various *modes of participation in international crimes* under which the various persons may be suspected of bearing responsibility. As the categories of international crimes have been listed elsewhere in the report, it may suffice here to recall briefly the various modes of participation in international crimes giving rise to individual criminal responsibility. In this context, the Commission's findings on possible perpetrators is presented in the most anonymous yet comprehensive way possible.
531. The Commission notes at the outset that it has identified ten (10) high-ranking central Government officials, seventeen (17) Government officials operating at the local level in Darfur, fourteen (14) members of the Janjaweed, as well as seven (7) members of the different rebel groups and three (3) officers of a foreign army (who participated in their individual capacity in the conflict), who may be suspected of bearing individual criminal responsibility for the crimes committed in Darfur.
532. The Commission's mention of the number of individuals it has identified should not however be taken as an indication that the list is exhaustive. First, the Commission has collected numerous names of other possible Janjaweed perpetrators, who have been identified by one eyewitness as participants or leaders of an attack. The names of these individuals will be listed and can be found in the sealed body of evidentiary material handed over to the High Commissioner for Human Rights, for transmittal to the judicial accountability mechanism decided by the Security Council. Furthermore, and importantly, the Commission has gathered substantial material on different influential individuals, institutions, groups of persons, or committees, which have played a significant role in the conflict in Darfur, including on planning, ordering, authorizing, and encouraging attacks. These include, but are not limited to, the military, the National Security and Intelligence Service, the Military Intelligence and the Security Committees in the three States of Darfur. These institutions should be carefully investigated so as to determine the possible criminal responsibility of individuals taking part in their activities and deliberations.

II. Modes of Criminal Liability for International Crimes

1. Perpetration or co-perpetration of international crimes

533. Under international criminal law, all those who, individually or jointly, take a conduct considered prohibited and criminalized, bear individual criminal liability for their conduct, if the requisite *mens rea* is present. Furthermore, a person may “commit” a crime by omission, where he or she has a duty to act.¹⁹²

(i.) *The Government of the Sudan*

534. The Commission has identified six (6) officials of the Government of the Sudan who participated directly in the commission of an international crime in Darfur. Five of these individuals, members of the armed forces operating in Darfur or civilian officials of the local Government in one of the three Darfur States, have led or otherwise participated in attacks against civilians, leading to forcible displacement of the affected villagers from their homes. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed by others during attacks. However, these individuals can be suspected of having committed indiscriminate attacks on civilians as a war crime. Finally, one official is suspected of having committed the crime of torture as a crime against humanity, on the persons of various detained individuals suspected of rebel activities.

(ii.) *Janjaweed*

535. The Commission has collected reliable material tending to show that fourteen (14) members of the Janjaweed have participated directly in the commission of an international crime in Darfur. These individuals have been identified by eyewitnesses when participating in an attack on a village, which often involved burning, looting, killing and sometimes rape. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed by others during attacks. However, they may be held responsible as direct perpetrators for the crimes they undeniably committed. Some of them are suspected of having committed various crimes simultaneously. Of these Janjaweed identified as perpetrators by the Commission, all of them are suspected of having committed indiscriminate attacks on civilians as a war crime. In addition, one (1) is also suspected of having participated in illegal detention of civilians and two (2) in the murder of civilians as crimes against humanity.

(iii.) *Rebels*

536. Three (3) members of the rebel groups have been seen by eyewitnesses as having participated in an attack on a village, where looting, abduction,

¹⁹² See *Rutaganda*, ICTR Trial Chamber, § 41; *Kunarac, Kovac & Vuković*, ICTY Trial Chamber, § 390, citing *Tadić*, ICTY Appeals Chamber, §188.

destruction and killing occurred. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed by others during attacks. However, they may be held responsible as direct perpetrators for the crimes they undeniably committed. In this case, they can be suspected of having committed indiscriminate attacks on civilians as a war crime.

(iv.) Foreign army officers (participating in their personal capacity)

537. Three (3) foreign army officers have been seen by eyewitnesses as having participated in an attack on a village, where looting, destruction and killing occurred. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed by others during attacks. However, they may be held responsible as direct perpetrators for the crimes they undeniably committed. In this case, they can be suspected of having committed indiscriminate attacks on civilians as a war crime.

2. Joint criminal enterprise to commit international crimes

538. *The notion of joint criminal enterprise in international criminal law.* As most national penal systems, also international criminal law does not hold criminally liable only those persons who, either alone or jointly with other persons, physically commit international crimes. International law also criminalizes conduct of all those who participated, although in varying degrees, in the commission of crimes, without performing the same acts. We will discuss below the notions of planning, ordering, instigating, aiding and abetting. International law, as was held in various cases,¹⁹³ also upholds the notion of joint criminal enterprise or of “common purpose” or “common design” and thus criminalizes the acts of a multitude of individuals who undertake actions that could not be carried out singly but perforce require the participation of more than one person. Indeed, in international criminal law the notion of joint criminal enterprise acquires greater significance than in most national legal systems, for most international crimes (crimes against humanity, genocide and most war crimes) are offences where the final criminal result may only be achieved through the involvement of many persons. This being the case, it would be illogical and inconsistent only to punish the person who is at the end of the chain, the man who pulls the trigger. All those who, although in varying degrees, participate in the accomplishment of the final result, must bear responsibility, or, as an ICTY Trial Chamber put it: “If the agreed crime is committed by one or other of the participants in the

¹⁹³ See *Tadić Appeals judgment* (1999), at §§ 185–229, the Trial Chamber decision in *Brđanin and Talić* (Decision on Form of Further Amended Indictment and Prosecution Application to Amend), of 26 June 2001, at 22–49. See also the Trial Chamber judgment in *Kordić and Čerkez*, (judgment of 26 February 2001), at §§ 393–400, *Krstić* (judgment of 2 August 2001, at §§ 611–46), *Kvočka and others* (judgment of 2 November 2001, at §§ 265–318), *Vasiljević* (judgment of 29 November 2002), at §§ 63–9.

joint criminal enterprise, all of the participants in that enterprise are guilty of the crime regardless of the part played by each in its commission".¹⁹⁴

539. The necessary requirements for there arising criminal liability for joint criminal enterprise are the following: (i) a plurality of persons; (ii) the existence of a common plan involving the commission of an international crime (this plan need, design or purpose need not be previously arranged or formulated, but "may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise";¹⁹⁵ (iii) participation of the accused persons in the execution of the common plan.
540. There may be two principal modalities of participation in a joint criminal enterprise to commit international crimes.¹⁹⁶ First, there may be a multitude of persons participating in the commission of a crime, who share from the outset a common criminal design (to kill civilians indiscriminately, to bomb hospitals, etc.). In this case, all of them are equally responsible under criminal law, although their role and function in the commission of the crime may differ (one person planned the attack, another issued the order to the subordinates to take all the preparatory steps necessary for undertaking the attack, others physically carried out the attack, and so on). The crucial factor is that the participants voluntarily took part in the common design and intended the result. Of course, depending on the importance of the role played by each participant, their position may vary at the level of sentencing, and international judges may pass different sentences. Nevertheless, they are all equally liable under criminal law.¹⁹⁷
541. There may be another major form of joint criminal liability. It may happen that while a multitude of persons share from the outset the same criminal design, one or more perpetrators commit a crime that had not been agreed upon or envisaged at the beginning, neither expressly nor implicitly, and therefore did not constitute part and parcel of the joint criminal enterprise. For example, a military unit, acting under superior orders, sets out to detain, contrary to international law, a number of enemy civilians; however, one of the servicemen, in the heat of military action, kills or tortures one of those civilians. If this is the case, the problem arises of whether the participants in the group other than the one who committed the crime not previously planned or envisaged, also bear criminal responsibility for such crime. As held in the relevant case law,¹⁹⁸ 'the responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one

¹⁹⁴ *Krnojelac*, ICTY Trial Chamber, 15 March 2002, § 82.

¹⁹⁵ See *Tadić (Appeal)*, 1999, at § 227.

¹⁹⁶ Although the ICTY Appeals Chamber, in *Tadić (Appeal)*, 1999 (at §§ 196, 202–204) found that the case law points to three different categories, in fact they boil down to two, for the first two are similar.

¹⁹⁷ On this class of joint criminal enterprise see *Tadić (Appeals)*, 1999, at §§, 196; *Krstić* (judgment of 2 August 2001, at §§ 611–46); *Kvočka and others* (judgment of 2 November 2001, at §§ 265–318), *Vasiljević* (judgment of 29 November 2002, at §§ 63–9).

¹⁹⁸ See the ICTY Appeals Chamber's judgment in *Tadić (Appeal)*, 1999, at § 228.

or other members of the group, and (ii) the accused *willingly took that risk*." In the example given above, and dependent upon the circumstances of each case, a court would have to determine whether it was foreseeable that detention at gunpoint of enemy servicemen might result in death or torture.

(i.) *The Government of the Sudan*

542. The Commission has identified six (6) members of the central Government of the Sudan who can be suspected of having committed an international crime under the notion of joint criminal enterprise. Some are members of the Sudan armed forces and some are high officials of the central Government in Khartoum. Considering that the crimes committed in Darfur were widespread and based on a overall policy, these persons have, in their official capacity and in the exercise of their functions, taken actions that have contributed to the commission of crimes in Darfur. Depending on the circumstances of each case, these individuals can thus be suspected, through the doctrine of joint criminal enterprise, of having committed murder of civilians as a crime against humanity; indiscriminate attacks on civilians as a war crime; forced displacement as a crime against humanity; and destruction of civilian objects as a war crime. Three (3) of them are also suspected of being responsible under the doctrine of joint criminal enterprise for the crime of enforced disappearance, a crime against humanity.
543. The Commission has also identified eight (8) local Government officials or members of the armed forces operating in Darfur who can be suspected of international crimes under the doctrine of joint criminal enterprise. Three (3) have contributed by their actions in the detention and execution of civilians. The five (5) others, as noted above, have been identified by eyewitnesses when participating in an attack on a village, which often involved burning, looting, and killing. Depending on the circumstances of each case, these individuals can thus be suspected, through the doctrine of joint criminal enterprise, of having committed murder of civilians as a crime against humanity; forcible confinement of civilians as a crime against humanity; forced displacement as a crime against humanity; destruction of civilian objects as a war crime.

(ii.) *Janjaweed*

544. The Commission has identified fourteen (14) Janjaweed who can be suspected of having committed an international crime under the notion of joint criminal enterprise. These individuals have been identified by eyewitnesses when participating in an attack on a village, which often involved burning, looting, killing and sometimes rape. Depending on the circumstances of each case, these individuals can thus be suspected, through the doctrine of joint criminal enterprise, of having committed murder of civilians as a crime against humanity; indiscriminate attacks on civilians as a war crime; destruction of civilian objects and looting as war crimes; and rape, torture and forcible displacement of civilians as crime against humanity.

(iii.) Rebels

545. Three (3) members of the rebel groups have been seen by eyewitnesses as having participated in an attack on a village, where looting, abduction, destruction and killing occurred. These individuals, depending of the circumstances, may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed during these attacks, namely murder of civilians, destruction of civilian objects, unlawful detention of civilians and looting as war crimes.

(iv.) Foreign army officers (acting in their personal capacity)

546. Three (3) foreign army officers have been seen by eyewitnesses as having participated in an attack on a village, where looting, destruction and killing occurred. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed during these attacks, namely murder of civilians, destruction of civilian objects and looting as war crimes.

3. Aiding and abetting international crimes

547. *The notion of aiding and abetting in international criminal law.* As pointed by international case law,¹⁹⁹ aiding and abetting a crime involves that a person (the accessory) gives practical assistance (including the provision of arms), encouragement or moral support to the author of the main crime (the principal), and such assistance has a substantial effect on the perpetration of the crime. The subjective element or *mens rea* resides in the accessory having knowledge that his actions assist the perpetrator in the commission of the crime.²⁰⁰

¹⁹⁹ See the decisions by the ICTR in *Akayesu* (§§ 704–5), *Musema* (§126) and by the ICTY in *Furundžija* (§§ 190–249) and *Kunarac and others* (§391).

²⁰⁰ The distinction between responsibility for aiding and abetting and responsibility for joint criminal enterprise was explained in *Tadić*, Appeals Chamber, §. 229:

^{1.} “The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

^{2.} In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution.

^{3.} The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

^{4.} In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.”

(i.) *The Government of the Sudan*

548. The Commission has identified six (6) central Government officials who may be suspected of aiding and abetting international crimes in Darfur, by recruiting, arming, providing financial support or otherwise aiding and abetting the crimes committed by the Janjaweed, which include murder of civilians as a crime against humanity; indiscriminate attacks on civilians and destruction of civilian objects as war crimes, forced displacement as a crime against humanity; as well as looting as war crime and rape as crime against humanity. The Commission notes that a pattern of looting and rape by the Janjaweed has clearly emerged during the conflict in Darfur, a fact which could not have been ignored by those identified by the Commission. By continuing their actions nonetheless, they may be suspected of having aided and abetted the Janjaweed to loot and rape.
549. For the same reasons, the Commission has identified seven (7) local Government officials or members of the armed forces operating in Darfur who may be suspected of aiding and abetting the Janjaweed to commit the crimes noted above.

(ii.) *Janjaweed*

550. The Commission has identified four (4) Janjaweed who may be suspected of aiding and abetting international crimes in Darfur, by recruiting, arming, providing financial support or otherwise aiding and abetting the crimes committed by the Janjaweed, including murder of civilians as a crime against humanity; indiscriminate attacks on civilians and destruction of civilian objects as war crimes, forced displacement as a crime against humanity; as well as looting as war crime and rape as crime against humanity. The Commission notes that a pattern of looting and rape by the Janjaweed has clearly emerged during the conflict in Darfur, a fact which could not have been ignored by those identified by the Commission. By continuing their actions nonetheless they may be suspected of having aided and abetted the Janjaweed to loot and rape.

4. *Planning international crimes*

551. Planning consists of devising, agreeing upon with others, preparing and arranging for the commission of a crime. As held by international case law, planning implies that "one or several persons contemplate designing the commission of a crime at both the preparatory and executory phases."²⁰¹
552. It is apparent from the exposition of violations set out in Section I of this Report that serious violations of human rights and humanitarian law were perpetrated on a large scale by Government forces or militias under Government control. Such violations as deliberate attacks on civilians, or indiscriminate attacks on

²⁰¹ See the rulings of an ICTR Trial Chamber in *Akayesu* (§480) and ICTY Trials Chambers in *Blaškić* (at §279) and *Kordić and Čerkez* (at § 386).

civilians and civilian objects, or attacks on villages hiding or sheltering rebels, which caused disproportionate harm to civilians, or mass executions, as well as forced displacement of civilians from their homes were widespread and systematic, and amounted to crimes against humanity. In addition, they were so frequent and repeated, that they made up a systematic pattern of criminal conduct. In other words, these attacks manifestly resulted from a centrally planned and organized policy.

553. Thus, it can safely be said that the magnitude and large-scale nature of some crimes against humanity (indiscriminate attacks on civilians, forced transfer of civilians), as well as their consistency over a long period of time (February 2003 to the present), necessarily imply that these crimes result from a central planning operation.
554. Against this background, the Commission has found reliable material which tends to show that two (2) high officials of the local authorities in Darfur have been involved in the planning of crimes against humanity and large-scale war crimes in Darfur, including indiscriminate attacks on civilians and destruction of civilian objects as war crimes; and murder of civilians as crime against humanity.

5. Ordering *international crimes*

555. As held by international case law, the order to commit an international crime need not be given in writing or in any particular form. Furthermore, the existence of an order may be proved through circumstantial evidence.²⁰² Ordering implies however a superior-subordinate relationship between the person giving the order and the one executing it. The 'superior' must be in a position where he or she possesses the authority to order.²⁰³

(i.) *The Government of the Sudan*

556. By reason of the official position in the chain of command, or by description of eyewitnesses in the battlefield, the Commission has gathered reliable material and information which tend to show that two (2) members of the central Government of the Sudan and two (2) members of the military operating in Darfur can be suspected of having ordered the commission of crimes against humanity and large-scale war crimes in Darfur, including indiscriminate attacks on civilians and destruction of civilian objects as war crimes; and forced displacement as crime against humanity.

(ii.) *Janjaweed*

557. The Commission has collected reliable information which allows it to point to two (2) members of the Janjaweed who have directly ordered the men

²⁰² See *Blaškić*, ICTY Trial Chamber, § 281.

²⁰³ See *Kordić and Cerkez*, ICTY Trial Chamber, § 380, confirmed by the Appeals Chamber, 17 December 2004, § 28..

under their control to execute civilians. They may be suspected of having ordered the murder of civilians, a crime against humanity.

6. Failing to prevent or repress the perpetration of international crimes (superior responsibility)

558. *The notion of superior responsibility (or command responsibility) in international criminal law.* In international law persons who hold positions of command may be held criminally responsible if they knowingly fail to prevent and repress international crimes committed by their subordinates. Command responsibility is a well-established principle of international law that reflects the hierarchical structure of disciplined forces.²⁰⁴ This responsibility for omission, set out in a number of national and international cases,²⁰⁵ arises under the following cumulative conditions: (i) the person exercises effective command, control or authority over the perpetrators; it is not necessary for a formal hierarchical structure to exist, for a *de facto* position of authority or control may suffice; in addition, the superior may be either a military commander or a politician or a civilian leader; moreover, the authority or control need not be exercised directly over the perpetrators of the crimes, but may be wielded through the chain of command; (ii) the superior knew, or should have known, or had information which should have enabled him to conclude in the circumstances prevailing at the time, that crimes were being or had been committed, and consciously disregarded such information or knowledge; (iii) the superior failed to take the necessary action to prevent or repress the crimes; in particular, he failed to take all the measures necessary to prevent the perpetration of the crimes; or he failed to stop the crimes while they were being committed; or failed to report to the relevant authorities that his subordinates had engaged in criminal conduct, or else failed to order the punishment of the perpetrators, if such punishment fell within his remit.
559. Depending on the circumstances of each case, the subjective element required by international law is knowledge (that is awareness that crimes are being committed or are about to be committed) and intent (the desire or will not to take action) or at least recklessness (awareness that failure to prevent the action of subordinates risks bringing about certain harmful consequences, and nonetheless ignoring such risk). Instead, when the superior

²⁰⁴ See 72 *British Yearbook of International Law* 2001, at 699.

²⁰⁵ They start with *Yamashita*, brought before the US Supreme Court in 1946 (judgment of 4 February 1946, 327 US 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946)) and upheld in some cases brought before the US Court sitting in Nuremberg (see *US v. Pohl and others*, judgment of 3 November 1947, in *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law no. 10* (Washington, DC: US Govt. Print. Office, 1950, vol. V at 1011 and 1055); *US v. von List and others*, judgment of 19 February 1948 (*ibidem*, vol. XI, at 512–515, 1230, 1244, 1256–1271, 1299, 1303); *US v. von Leeb and others*, judgment of 28 October 1948 (*ibidem*, vol. XI, at 510–550, 631), *US v. von Weizsäcker*, judgment of 12 December 1949 (*ibidem*, vol. XIV, at 487, 517, 671), as well as in *Delalić and others* (§§ 354–8), in *Blaskić* (§§ 295–303), in *Kordić and Čerkez* (§ 405–17).

should have known that crimes were being committed or had been committed, culpable negligence seems to be sufficient. Finally, when the superior knows that crimes have been committed and fails to act to repress them, what is required, in addition to knowledge, is intent not to take action (or at least culpable negligence).

560. It is necessary to add that the notion of superior responsibility also applies to internal armed conflicts, as authoritatively held by international criminal tribunals.²⁰⁶ The legal opinion of States is to the same effect.²⁰⁷
561. With regard to the position of rebels, it would be groundless to argue (as some rebel leaders did when questioned by the Commission) that the two groups of insurgents (SLA and JEM) were not tightly organized militarily, with the consequence that often military engagements conducted in the field had not been planned, directed or approved by the military leadership. Even assuming that this was true, commanders must nevertheless be held accountable for actions of their subordinates. The notion is widely accepted in international humanitarian law that each army, militia or military unit engaging in fighting either in an international or internal armed conflict must have a commander charged with holding discipline and ensuring compliance with the law. This notion is crucial to the very existence as well as enforcement of the whole body of international humanitarian law, because without a chain of command and a person in control of military units, anarchy and chaos would ensue and no one could ensure respect for law and order.
562. There is another and more specific reason why the political and military leadership of SLA and JEM may not refuse to accept being held accountable for any crime committed by their troops in the field, if such leadership refrained from preventing or repressing these crimes. This reason resides in the signing by that leadership of the various agreements with the Government of the Sudan. By entering into those agreements on behalf of their respective "movements" the leaders of each "movement" assumed full responsibility for conduct or misconduct of their combatants. More specifically, in the Protocol on the Establishment of Humanitarian Assistance in Darfur, of 8 April 2004, the rebels undertook to respect the general principles of international humanitarian law, and these principle no doubt include that of superior responsibility.

²⁰⁶ See the rulings by an ICTY Trial Chamber in *Hadžihasanović and others* (Decision on joint challenge to jurisdiction, 12 November 2002, §§ 9–179) and by the ICTY Appeals Chamber in the same case (Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, 16 July 2003, at §§ 11–36).

²⁰⁷ For instance, in a Memorandum of 21 January 2000 the Canadian Foreign Department's Legal Bureau, after stating that Articles 25 and 28 of the ICC Statute (respectively on responsibility for ordering, soliciting, etc. crimes and responsibility of commanders or superiors) "codify international customary law with respect to criminal responsibility" (in 38 *Canadian Yearbook of International Law* 2000, at 336), the legal Bureau goes on to note that "In internal armed conflicts, a non-state leader could also be convicted of war crimes, if the prosecutor proved that the leader was part of an 'organized armed group.'" (*ibidem*, at 337).

(i.) The Government of the Sudan

563. The Commission has gathered reliable information which allows it to identify eight (8) senior central Government officials and military commanders and six (6) local Government officials or members of the armed forces operating in Darfur who may be suspected of being responsible for knowingly failing to prevent or repress the perpetration of crimes, i.e. for superior responsibility. A consistent body of credible material collected by the Commission suggests that these officials were cognisant of the situation in Darfur, and the large-scale perpetration of violations of international human rights law and international humanitarian law in the region, from their own sources and from other sources, or at the very least, should have known what was happening in Darfur, but failed to take any action to stop the atrocities being perpetrated. Furthermore, they failed to punish those under their control who committed serious crimes. Depending on the circumstances of each case, they may be suspected of bearing superior responsibility for the crimes committed by the men under their effective control, which included murder of civilians as a crime against humanity; indiscriminate attacks on civilians as a war crime and forced displacement as a crime against humanity; destruction of civilian objects and looting as war crimes; and torture as war crime.

(ii.) Rebels

564. In keeping with the comment made above concerning the structure of the rebel groups in mind, the Commission has gathered sufficient reliable material to point to four (4) individuals holding positions of importance within the different rebel groups who may be suspected of being responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels. Having effective overall control over military personnel fighting for the rebel groups, there is information that they were aware of some crimes committed by such military personnel or at the very least, should have known what was happening, but failed to take any action to stop the atrocities being perpetrated. Furthermore, they failed to punish those under their control who committed serious crimes. These individuals may thus be suspected to be responsible, under the doctrine of superior responsibility, for the crimes committed by the rebels under their authority, namely murder of civilians, destruction of civilian objects, forced disappearances and looting as war crimes.

SECTION IV: POSSIBLE MECHANISMS TO ENSURE ACCOUNTABILITY FOR THE CRIMES COMMITTED IN DARFUR

I. General: The Inadequacies of the Sudanese Judicial Criminal System and the Consequent Need to Propose Other Criminal Mechanisms

565. *The need to do justice.* The magnitude and serious nature of the crimes committed against the civilian population in Darfur, both by the Government forces and the Janjaweed, and by the rebels, demand immediate action by

the international community to end these atrocities. Authors of these crimes must be brought to justice. At the same time measures to bring relief and redress to the victims must be initiated to complete the process of accountability.

566. It is notable that not only the United Nations Security Council, in its resolutions 1556 and 1564, emphasized the urgent need for justice, but also the very parties to the conflict in Darfur insisted on the principle of accountability. Thus, in the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004, the parties “[stressed] the need to restore and uphold the rule of law, including investigating all cases of human rights violations and bringing to justice those responsible, in line with the AU’s expressed commitment to fight impunity” (preamble § 7). Moreover, the parties to the conflict, at Article 2(8), committed themselves to “[e]nsure that all forces and individuals involved or reported to be involved in violations of the rights of the IDPs, vulnerable groups and other civilians will be transparently investigated and held accountable to the appropriate authorities”. The question however arises as to whether these are meaningless commitments, having only cosmetic value.
567. *The inaction of both the Sudanese authorities and the rebels.* The failure of both the Government and the rebels to prosecute and try those allegedly responsible for the far too numerous crimes committed in Darfur is conspicuous and unacceptable. As pointed out above, the Government has taken some steps, which however constitute more a window-dressing operation than a real and effective response to large scale criminality linked to the armed conflict. The rebels have failed to take any investigative or punitive action whatsoever.
568. The normal and ideal response to atrocities is to bring the alleged perpetrators to justice in the courts of the State where the crimes were perpetrated, or of the State of nationality of the alleged perpetrators. There may indeed be instances where a domestic system operates in an effective manner and is able to deal appropriately with atrocities committed within its jurisdiction. However, the very nature of most international crimes implies, as a general rule, that they are committed by State officials or with their complicity; often their prosecution is therefore better left to other mechanisms. Considering the nature of the crimes committed in Darfur and the shortcomings of the Sudanese criminal justice system, which have led to effective impunity for the alleged perpetrators, the Commission is of the opinion that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders.. Other mechanisms are needed to do justice.
569. The Commission is of the view that two measures should be taken by the Security Council to ensure that justice is done for the crimes committed in Darfur, keeping in mind that any justice mechanism must adhere to certain recognized principles: it must be impartial, independent, and fair. With regard to the judicial accountability mechanism, the Commission recommends the referral of the situation of Darfur to the International Criminal Court (ICC) by the United Nations Security Council. As stated above, the Sudanese judicial system has proved incapable, and the authorities unwilling, of ensuring

accountability for the crimes committed in Darfur. The international community cannot stand idle by, while human life and human dignity are attacked daily and on so large a scale in Darfur. The international community must take on the responsibility to protect the civilians of Darfur and end the rampant impunity currently prevailing there.

570. The other measure is designed to provide for compensation to the victims of so many gross violations of human rights, most of them amounting to international crimes. It is therefore proposed that a Compensation Commission be established by the Security Council.

II. Measures to be Taken by the Security Council

1. Referral to the International Criminal Court

(i.) Justification for suggesting the involvement of the ICC

571. The ICC is the first international permanent court capable of trying individuals accused of serious violations of international humanitarian law and human rights law, namely war crimes, crimes against humanity and genocide. The treaty that established the ICC, the Rome Statute²⁰⁸, entered into force on July 1, 2002. The Commission holds the view that the International Criminal Court should be drawn upon. Resort to the ICC would present at least six major merits.
572. The Commission holds the view that resorting to the ICC would have at least six major merits. First, the International Criminal Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under Article 13 (b). The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus, is difficult or even impossible, resort to the ICC, the only truly international institution of criminal justice, which would ensure that justice be done. The fact that trials proceedings would be conducted in the Hague, the seat of the ICC, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the ICC, backed up by that of the United Nations Security Council, might compel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules

²⁰⁸ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, accessible at: <http://www.un.org/law/icc/statute/rome.htm>.

of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor. Fifth, the ICC could be activated immediately, without any delay (which would be the case if one were to establish ad hoc tribunals or so called mixed or internationalized courts). Sixth, the institution of criminal proceedings before the ICC, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.²⁰⁹

(ii.) *Inadvisability of other mechanisms*

573. The Commission considers that the ICC is the only credible way of bringing alleged perpetrators to justice. It strongly advises against other measures.

(a.) The inadvisability of setting up an ad hoc International Criminal Tribunal

574. Given that international action is urgently needed, one might consider opportune to establish an ad hoc International Criminal Tribunal, as was the case for previous armed conflicts such as those in the former Yugoslavia and in Rwanda, when the ICC did not exist yet. However, at least two considerations militate against such a solution. First, these Tribunals, however meritorious, are very expensive. Secondly, at least so far, on a number of grounds they have been rather slow in the prosecution and punishment of the indicted persons. It would seem that it is primarily for these reasons that at present no political will appears to exist in the international community to set up yet another ad hoc International Criminal Tribunal (another major reason being that now a permanent and fully-fledged international criminal institution is available).

(b.) The inadvisability to expand to mandate of one of the existing Ad Hoc Criminal Criminal Tribunals

575. The same reasons hold true against the possible expansion, by the Security Council, of the mandate of the ICTY or the ICTR, so as to also include jurisdiction over crimes committed in Darfur. First, this expansion would be time-consuming. It would require, after a decision of the Security Council, the election of new judges and new prosecutors as well as the appointment

²⁰⁹ Under Article 115 of the ICC Statute "The expenses of the Court . . . shall be provided by the following sources: (a) assessed contributions made by States Parties; (b) Funds provided by the United Nations, subject to the approval of the General Assembly, *in particular in relation to the expenses incurred due to referrals by the Security Council*" (emphasis added). Thus, a referral by the Security Council may entail some expenses for the United Nations, chiefly for financing investigations. Nevertheless, no financial burden will be borne by the United Nations for the most expensive part of the functioning of international criminal tribunals, namely the establishment of the court, the payment for the seat of the court, as well as payment of Judges, the Prosecutor's office and the Registry staff.

of Registry staff. Indeed, at present the Tribunals are overstretched, for they are working very hard to implement to “completion strategy” elaborated and approved by the Security Council. Consequently, any new task for either Ad Hoc Criminal Tribunal would require new personnel, at all levels. In addition, the allocation of new tasks and the election or appointment of new staff would obviously require new financing. Thus, the second disadvantage of this option is that it would be very expensive. It should be added the conferment of a new mandate on one of the existing Tribunals would exhibit a third drawback: such expansion could end up creating great confusion in the Tribunal, which all of sudden would have to redesign its priorities and reconvert its tasks so as to accommodate the new functions.

(c.) The inadvisability of establishing mixed courts

576. Where, as in Sudan, States are faced with emergency situations involving the commission of large-scale atrocities, an option may be not to resort to national or international criminal courts, but rather to establish courts that are mixed in their composition, that is consisting of both international judges and prosecutors and of judges and prosecutors having the nationality of the State where the trials are held.
577. The mixed courts established in other conflicts have followed two similar but distinct models. First, the mixed courts can be organs of the relevant State, being part of its judiciary, as in Kosovo, East Timor, Bosnia and Cambodia. Alternatively, the courts may be international in nature, that is, free-standing tribunals not part of the national judiciary, as in Sierra Leone. The latter, for instance, is an international criminal court, but some of its judges and other officials are nationals of Sierra Leone, giving it a hybrid character which makes it different from other international criminal courts, such as the ICC, the ICTY and the ICTR. It also differs from these international criminal courts in that it is located in the country where the crimes occurred and it is funded by voluntary contributions (not assessed contributions from the United Nations budget or, as is the case for the ICC, by the States parties).
578. One obvious drawback for the creation of a special court for the crimes committed in Darfur is its financial implications. The special court for Sierra Leone, with its voluntary contributions, is hardly coping with the demands of justice there. Another major drawback can be seen in the time-consuming process for establishing these courts by means of an agreement with the United Nations. The ICC offers the net advantage, as noted above, to impose no significant financial burden on the international community and to be immediately available.
579. Thirdly, the investigation and prosecution would relate to persons enjoying authority and prestige in the country and wielding control over the State apparatus. The establishment of a special court by agreement between the actual Government and the United Nations for the investigation and prosecution of members of that very Government seems unlikely. Moreover, the situation of the national judges who would sit on courts dealing with crimes which may have been committed by leaders would not only be uncomfortable, but unbearable and dangerous.

580. Fourthly, many of the Sudanese laws are grossly incompatible with international norms. To establish mixed courts with the possibility for them of relying upon the national legal system would give rise to serious problems, particularly with regard to the 1991 Sudanese criminal procedural law. In contrast, the ICC constitutes a self-contained regime, with a set of detailed rules on both substantive and procedural law that are fully attuned to respect for the fundamental human rights all those involved in criminal proceedings before the Court.
581. Furthermore, and importantly, the situation of Sudan is distinguishable in at least one respect from most situations where a special court has been created in the past. The impugned crimes *are* within the jurisdiction *rationae temporis* of the ICC, i.e. the crimes discussed in this Report were committed after 1 July 2002.²¹⁰
582. Based on all of the above, the Commission strongly holds the view that resort to the ICC, the only truly international criminal institution, is the single best mechanism to allow justice to be made for the crimes committed in Darfur.

(iii.) Modalities of activation of the ICC jurisdiction

583. Sudan signed the Rome Statute of the ICC on 8 September 2000, but has not yet ratified it and is thus not a State party²¹¹. The prosecution of nationals of a State that is *not* party to the Rome Statute is possible under limited circumstances. First, it is possible if the crime occurred on the territory of a State party (Rome Statute, art. 12 (2) (a)). This is obviously not applicable in this case since the crimes occurred in the Sudan and were allegedly committed by Sudanese nationals.²¹² Secondly, the ICC's jurisdiction can be triggered by a referral to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations (Rome Statute, art. 13 (b)). Finally, the Sudan may, by declaration lodged with the Court's Registrar, accept the exercise of jurisdiction by the Court with respect to the crimes in question (Rome Statute, art. 12 (3)).
584. The Commission strongly recommends to the Security Council to immediately refer to the ICC the situation of Darfur and the crimes perpetrated there since the beginning of the internal armed conflict in Darfur. The Security Council's referral would be fully warranted, for indisputably the situation of Darfur constitutes a threat to the peace, as the Security Council determined in its resolutions 1556 (2004) and 1564 (2004). The prosecution by the ICC of

²¹⁰ See ICC Statute, article 11.

²¹¹ See ICC's official website: <http://www.icc-cpi.int/statesparties.html#S>, retrieved on November 2, 2004, updated as of September 27, 2004.

²¹² If crimes under the jurisdiction of the ICC were proved to have been committed in Chad or by Chad nationals, the situation would remain the same so far as the Court's jurisdiction is concerned: Chad has signed the Rome Statute on October 20, 1999 but has not yet ratified it. See ICC website: <http://www.icc-cpi.int/statesparties.html#S>, retrieved on November 2, 2004, updated as of September 27, 2004.

persons allegedly responsible for the most serious crimes in Darfur would no doubt contribute to the restoration of peace in that region. Recourse to the Court would have the numerous major merits emphasized above.

585. There is little doubt that the alleged crimes that have been documented in Darfur meet the thresholds of the Rome Statute as defined in articles 7 (1), 8 (1) and 8 (f). As was stated earlier, today there is a protracted armed conflict not of an international nature in Darfur between the governmental authorities and organized armed groups. As the factual findings demonstrate, a body of reliable information indicates that war crimes may have been committed on a large-scale, at times even as part of a plan or a policy. There is also a wealth of credible material which suggests that criminal acts which constitute widespread or systematic attacks directed against the civilian population were committed with knowledge of the attacks. These may amount to crimes against humanity.
586. The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive particularly undermined the effectiveness of the judiciary. In fact, many of the laws in force in Sudan today contravene basic human rights standards. The Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In any event, many feared reprisals if they resorted to the national justice system.
587. The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective. As is stated elsewhere in this report, very few victims lodged official complaints regarding crimes committed against them or their families due to a lack of confidence in the justice system. Of the few cases where complaints were made, most of the cases were not properly pursued. Further procedural hurdles limited the victims' access to justice, such as a requirement of medical examination for victims of rape. A Minister of Justice Decree relaxing this requirement for registering rape complaints is not known to most law enforcement agencies in Darfur. The Rape Commissions established by the Minister of Justice have been ineffective in investigating this crime. The Ministry of Defence established one Committee to compensate the victims of three incidents of bombing by mistake in Habila, Um Gozin and Tulo. While the report of the National Commission of Inquiry established by the President acknowledged some wrong-doings on the part of the Government, most of the report is devoted to justifying and rationalizing the actions taken by the Government in relation to the conflict. The reality is that, despite the magnitude of the crisis and its immense impact on civilians in Darfur, the Government informed the Commission of very few cases of individuals who have been prosecuted or even simply disciplined in the context of the current crisis.

588. Referring the situation in Darfur to the ICC in a resolution adopted under Chapter VII of the United Nations Charter would have a mandatory effect. In this way, the Government of Sudan could not deny the Court's jurisdiction under any circumstances. The Commission recommends that the resolution should empower the ICC prosecutor to investigate on his own initiative any individual case that is related to the current conflict in Darfur. As for the temporal scope of these investigations, the Commission suggests that the resolution should not limit the investigations to a specific time frame. As is clear from this report, while there was escalation in the attacks after February 2003, the Commission received information regarding events that took place in 2002 and even before. As pursuant to Article 1(1) of its Statute the ICC has temporal jurisdiction as from 1 July 2002, the Prosecutor could investigate crimes committed after that date.
589. In the opinion of the Commission, it would be fully appropriate for the Security Council to submit the situation of Darfur to the ICC. The Security Council has repeatedly emphasized, in resolutions 1556 and 1564, that the Government of Sudan has committed serious violations of human rights against its own nationals, and that serious breaches of human rights are also being committed by the rebels. To this consistent pattern of large scale violations of human rights not only individual States, but the whole world community through its most important political organ should energetically react. Moreover, the Security Council also stressed in its aforementioned resolutions the need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region, thereby allowing the hundreds of thousands of internally displaced persons to return to their homes or to any other place of their choosing (see in particular its resolutions 1556 and 1564). It would thus be consistent for the Security Council, the highest body of the international community responsible for maintaining peace and security, to refer the situation of Darfur and the crimes perpetrated there, to the highest criminal judicial institution of the world community.

2. Establishment of a Compensation Commission

590. For the reasons that will be set out below, the Commission also proposes to the Security Council the establishment of a Compensation Commission, not as an alternative, but rather as a measure complementary to the referral to the ICC. States have the obligation to act not only against perpetrators but also on behalf of victims. While a Compensation Commission does not constitute a mechanism for ensuring that those responsible are held accountable, its establishment would be vital to redressing the rights of the victims of serious violations committed in Darfur.

(i.) Justification for suggesting the establishment of a Compensation Commission

591. Given the magnitude of damage caused by the armed conflict to civilian populations, it proves necessary to envisage granting reparation to victims

of crimes committed during such conflict, whether or not the perpetrators of international crimes have been identified.

592. This proposal is based on practical and moral grounds, as well as on legal grounds. As for the former, suffice it to mention that in numerous instances, particularly in rape cases, it will be very difficult for any judicial mechanism to establish who perpetrated such crimes. In other words, judicial findings and retribution by a court of law may prove very difficult or even impossible. In such cases it would be necessary at least to make good the material and moral damage caused to the victims. Although the perpetrators will in fact continue to enjoy impunity, the international community may not turn a blind eye to the victims' plight. It should as a minimum attenuate their suffering by obliging the Sudanese State to make reparation for their harm.
593. Serious violations of international humanitarian law and human rights law can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or state-like entity) on whose behalf the perpetrator was acting. This international responsibility involves that the State (or the state-like entity) must pay compensation to the victim.²¹³
594. At the time this international obligation was first laid down, and perhaps even in 1949, when the Geneva Conventions were drafted and approved, the obligation was clearly conceived of as an obligation of each contracting State towards any other contracting State concerned. In other words, it was seen as an obligation between States, with the consequence that (i) each relevant State was entitled to request reparation or compensation from the other State concerned, and (ii) its nationals could concretely be granted compensation for any damage suffered only by lodging claims with national courts or other organs of the State. National case law in some countries²¹⁴ has held that the

²¹³ The international obligation to pay compensation was first laid down in Article 3 of the 1907 Hague Convention on Land Warfare, whereby "A belligerent party which violates the provisions of the said Regulations [the Regulations annexed to the Convention, also called Hague Regulations] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." This obligation was restated, with regard to grave breaches of the 1949 Geneva Conventions, in each Convention, where it was provided that "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding article [on grave breaches]" (common Article on grave breaches, found respectively at 51/52 /131/148). The same obligation, although worded in the terms of Article 3 of the 1907 Hague Convention, was laid down in Article 91 of the First Additional Protocol.

²¹⁴ See the Japanese cases mentioned by Shin Hae Bong, "Compensation for Victims of War-time Atrocities – Recent Developments in Japan's Case Law," in 3*Journal of International Criminal Justice* (2005), at 187–206. See also the German cases referred to in A. Gattini, *Le Riparazioni di Guerra nel Diritto Internazionale* (Padova: Cedam, 2003), 249 ff. However, on 11 March 2004 the Italian Court of cassation delivered in *Ferrini* an elaborate judgment in which the Court, based among other things on *jus cogens*, held that an Italian deported to Germany for slave labour in 1944 was entitled to compensation for this war crime, because the international norms on compensation, given their peremptory nature, overrode the customary rules on foreign State immunity (text in Italian in 87*Rivista di diritto internazionale* (2004), 540–551)).

obligation at issue 150 was not intended directly to grant rights to individual victims of war crimes or grave breaches. In addition, the international obligation was to be considered as fulfilled any time, following the conclusion of a peace treaty, the responsible State had agreed to pay to the other State or States war reparations or compensation for damages caused to the nationals of the adversary, regardless of whether actual payment was ever made.

595. The emergence of human rights doctrines in the international community and the proclamation of human rights at the universal and national level since the adoption of the United Nations Charter in 1945 had a significant impact on this area as well. In particular, the right to an effective remedy for any serious violation of human rights has been enshrined in many international treaties.²¹⁵ Furthermore, the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985, provides that States should develop and make readily available appropriate rights and remedies for victims.²¹⁶
596. The right to an effective remedy also involves the right to reparation (including compensation), if the relevant judicial body satisfies itself that a violation of human rights has been committed; indeed, almost all the provisions cited above mention the right to reparation as the logical corollary of the right to an effective remedy.
597. As the then President of the ICTY, Judge C. Jorda, rightly emphasized in his letter of 12 October 2000 to the United Nations Secretary-General,²¹⁷ the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on

²¹⁵ See Article 2 (3) of the UN Covenant on Civil and Political Rights, Article 6 of the 1965 Convention on the Elimination of Racial Discrimination, Article 14 of the 1984 Convention Against Torture, Article 39 of the 1989 Convention on the Rights of the Child, as well as Articles 19 (3) and 68 (3) of the Statute of the International Criminal Court. See also Article 8 of the 1948 Universal Declaration of Human Rights.

²¹⁶ Article 21 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted on 29 November 1985 by the UN General Assembly (resolution 40/34). See also the "Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law" which are currently under consideration by the Commission on Human Rights upon proposals by Mr T. van Boven and Mr C. Bassiouni.

²¹⁷ "The emergence of human rights under international law has altered the traditional State responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments, and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility. Moreover, there is a clear trend in international law to recognize a right to compensation in the victim to recover from the individual who caused his or her injury. This right is recognized in the Victims Declaration [adopted by the GA], the Basic Principles [adopted by the Commission on Human Rights], other international human rights instruments and, most specifically, in the ICC Statute, which is indicative of the state of the law at present." (in UN doc. S/2000/1063, at p. 11, § 20 of the Annex).

State responsibility for war crimes and other international crimes. These provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.

598. In light of the above, and based on the aforementioned body of law on human rights, the proposition is warranted that at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as *de jure* or *de facto* organs, to make reparation (including compensation) for the damage made.
599. Depending on the specific circumstances of each case, reparation may take the form of *restitutio in integrum* (restitution of the assets pillaged or stolen), monetary compensation, rehabilitation including medical and psychological care as well as legal and social services, satisfaction including a public apology with acknowledgment of the facts and acceptance of responsibility, or guarantees of non-repetition.²¹⁸ As rightly stressed by the U.N. Secretary-General in 2004, it would also be important to combine various mechanisms or forms of reparation.²¹⁹
600. It is in light of this international legal regulation that the obligation of the Sudan to pay compensation for all the crimes perpetrated in Darfur by its

²¹⁸ The various forms of compensation and their respective advantages were aptly set out by the UN Secretary-General in his Report to the SC of 23 August 2004 on "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies". There the Secretary-General stated the following: "reparations sometimes include non-monetary elements, such as restitution of victims' legal rights, programmes of rehabilitation for victims and symbolic measures, such as official apologies, monuments and commemorative ceremonies. The restoration of property rights, or just compensation where this cannot be done, is another common aspect of reparations in post-conflict countries. Material forms of reparation present perhaps the greatest challenges, especially when administered through mass government programmes. Difficult questions include who is included among the victims to be compensated, how much compensation is to be rewarded, what kinds of harm are to be covered, how harm is to be quantified, how different kinds of harm are to be compared and compensated and how compensation is to be distributed." (UN doc. S/2004/616, at p. 18–9, § 54).

²¹⁹ "No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions. Whatever mode of transitional justice is adopted and however reparations programmes are conceived to accompany them, both the demands of justice and the dictates of peace require that something be done to compensate victims. Indeed, the judges of the tribunals for Yugoslavia and Rwanda have themselves recognized this and have suggested that the United Nations consider creating a special mechanism for reparations that would function alongside the tribunals." (*ibidem*, p. 19, § 55).

agents and officials or de facto organs must be seen. A similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished.

(ii.) *Establishment of a Compensation Commission*

601. It is therefore proposed to establish an International Compensation Commission, consisting of fifteen (15) members, ten (10) appointed by the United Nations Secretary-General and five (5) by an independent Sudanese body. This Commission, to be chaired by an international member, should be composed of persons with an established international reputation, some specialising in law (in particular international law, torts, or commercial law), others in accounting, loss adjustment and environmental damage. The Commission should split into five chambers, each of three members; it should sit in Darfur and have a three year mandate. Four Chambers should deal with compensation for any international crime perpetrated in Darfur. A special fifth Chamber should deal specifically with compensation for victims of rape. Such chamber is necessary considering the widespread nature of this crime in Darfur and the different nature of the damage suffered by the victims. Compensation also takes a special meaning here considering that, for rape in particular, as stated above it is very difficult to find the actual perpetrators. Many victims will not benefit from seeing their aggressor held accountable by a court of law. Hence a special scheme may be advisable to ensure compensation (or, more generally, reparation) for the particularly inhumane consequences suffered by the numerous women raped in Darfur.
602. The Commission should pronounce upon claims to compensation made by all victims of crimes, that is (under the terms of the GA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted on 29 November 1995), persons that "individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights" as a result of international crimes in Darfur, committed by either Government authorities or any de facto organ acting on their behalf or by rebels, whether or not the perpetrator has been identified and brought to trial.
603. Funding for payment of compensation to victims of crimes committed by Government forces or de facto agents of the Government should be provided by the Sudanese authorities, which should be requested by the United Nations Security Council to place the necessary sum into an escrow account. Funding for compensation of victims of crimes committed by rebels (whether or not the perpetrators have been identified and brought to trial) should be afforded through a Trust Fund to be established on the basis of international voluntary contributions.

III. Possible Measures by Other Bodies

604. While referral to the ICC is the main immediate measure to be taken to ensure accountability, the Commission wishes to highlight some other

available measures, which are *not* suggested as possible *substitutes* for the referral of the situation of Darfur to the ICC.

1. Possible role of national courts of States other than Sudan

605. Courts of States other than Sudan may play an important role in bringing to justice persons suspected or accused of international crimes in Darfur. In this respect the question however arises of whether and to what extent this is compatible with the activation of the ICC. It is therefore fitting briefly to discuss the issue of the respective role of national courts and the ICC in cases where a situation has been referred by the Security Council to the ICC.

(i.) Referral by the Security Council and the principle of complementarity

606. The question to be addressed is that of whether the principle of complementarity on which the ICC is based, i.e. the principle whereby the Court only steps in when the competent national courts prove to be unable or unwilling genuinely to try persons accused of serious international crimes falling under the Court's jurisdiction, should apply in the case under discussion. In other words, the question arises whether, when the Security Council refers a "situation" to the ICC under Article 13 (b) of the ICC Statute, the Court must apply the principle of complementarity and therefore first see whether there is any competent national court willing and able to prosecute the crimes emerging in the "situation."

607. The Commission notes that while it is true that under Article 18 (1) of the ICC Statute the Prosecutor is bound to notify all States Parties that a State has referred to him a "situation" or that he has decided to initiate investigations *proprio motu*, no such duty of notification to States Parties exists with regard to Security Council referrals. However, from these rules on notifications it does not follow that complementarity becomes inapplicable in the case of Security Council referrals. Indeed, it would seem that the fact that the Prosecutor is not obliged to notify States Parties of a Security Council referral is justified by the fact that in such case all States are presumed to know of such referral, given that acts of that body are public and widely known. This is further evidenced by the fact that the Security Council is the supreme body of the Organization and all members of the United Nations are bound by its decisions pursuant to Article 25 of the United Nations Charter. In contrast, without the Prosecutor's notification it would be hard for States immediately to become cognizant of his decision to initiate an investigation *proprio motu* or following the referral by a State. Complementarity therefore also applies to referrals by the Security Council.

608. However, a referral by the Security Council is normally based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so.²²⁰ Therefore, the principle of complementarity will not usually be invoked *in casu* with regard to that State.

²²⁰ The Commission however acknowledges that the final decision in this regard remains that of the ICC Prosecutor.

609. The Commission's recommendation for a Security Council referral to the ICC is based on the correct assumption that Sudanese courts are unwilling and unable to prosecute the numerous international crimes perpetrated in Darfur since 2003. The Commission acknowledges that the final decision in this regard lies however with the ICC Prosecutor.

(ii.) *The notion of "universal jurisdiction"*

610. The Commission wishes to emphasise that the triggering of the ICC jurisdiction by the Security Council should be without prejudice to the role that the national criminal courts of *other* States can play. Indeed, other states might exercise the so-called universal jurisdiction over crimes allegedly committed in Darfur. The Commission sees the exercise of universal jurisdiction, subject to the conditions set out below, as a complementary means of ensuring accountability for the crimes committed in Darfur, which could indeed help to alleviate the burden of the ICC.
611. The traditional way to bring to trial alleged perpetrators of international crimes to justice is for States to rely on one of two unquestionable principles: territoriality (the crime has been committed on the State's territory) and active nationality (the crime has been committed abroad, but the perpetrator is a national of the prosecuting State). In addition, extraterritorial jurisdiction over international crimes committed by non-nationals has been exercised and is generally accepted on the basis of passive personality (the victim is a national of the prosecuting State).
612. In the absence of any of these accepted jurisdictional links at the time of the commission of the offence, the principle of universality empowers any State to bring to trial persons accused of international crimes, regardless of the place of commission of the crime, and the nationality of the perpetrator or the victim. This principle is justified by the notion that international crimes constitute attacks on the whole international community and infringe on values shared by all members of that community.
613. It seems indisputable that a general rule of international law exists authorising States to assert universal jurisdiction over war crimes, as well as crimes against humanity and genocide. The existence of this rule is proved by the convergence of States' pronouncements, national pieces of legislation,²²¹ as well as by case law.²²²

²²¹ See for instance the legislation of such countries as Spain (Article 23 of the 1985 General law on the Judiciary), Austria (Article 65.1.2 of the Criminal Code), Switzerland (Articles 108 and 109 of the Military Penal Code), and Germany (Article 6.9 of the Criminal Code).

²²² For instance, see the decision the Spanish Constitutional Court delivered on 10 February 1997 in the *Panamian Ship* case (in *El Derecho*, cdrom, 2002, Constitutional decisions); the decision (*auto*) the Spanish *Audiencia nacional* handed down on 4 November 1998 in *don Alfonso Francisco Scilingo* (ibidem., Criminal cases), the decisions of the same *Audencia nacional* in *Pinoche* (decision of 24 September 1999, ibidem), *Fidel Castro* (decision of 4 March 1999, ibidem), as well as the judgment of 21 February 2001 handed down by the German Supreme Court (*Bundesgerichtshof*) in *Sokolović* (3 StR 372/00).

614. However, the customary rules in question, construed in the light of general principles currently prevailing in the international community, arguably make the exercise of universal jurisdiction subject to two major conditions. First, the person suspected or accused of an international crime must be present on the territory of the prosecuting State. Second, before initiating criminal proceedings this State should request the territorial State (namely, the State where the crime has allegedly been perpetrated) or the State of active nationality (that is, the State of which the person suspected or indicted is a national) whether it is willing to institute proceedings against that person and hence prepared to request his or her extradition. Only if the State or States in question refuse to seek the extradition, or are patently unable or unwilling to bring the person to justice, may the State on whose territory the person is present initiate proceedings against him or her.
615. In the case of Darfur the second condition would not need to be applied, for, as pointed out above, Sudanese courts and other judicial authorities have clearly shown that they are unable or unwilling to exercise jurisdiction over the crimes perpetrated in Darfur.

(iii.) Exercise of universal jurisdiction and the principle of complementarity of the ICC

616. The issue of Security Council referrals and the principle of complementarity has been discussed above. The Commission takes the view that complementarity would also apply to the relations between the ICC and those national courts of countries other than Sudan. In other words, the ICC should defer to national courts other than those of Sudan which genuinely undertake proceedings on the basis of universal jurisdiction. While, as stated above, a referral by the Security Council will normally be based on the assumption that the *territorial* State is not administering justice because it is unwilling or unable to do so ²²³, there is instead no reason to doubt *a priori* the ability or willingness of any other State asserting either universal jurisdiction or jurisdiction based on any of the basis for extra-territorial jurisdiction mentioned above. The principle of complementarity, one of the mainstays of the ICC system, should therefore operate fully in cases of assertion of universal jurisdiction over a crime which had been referred to the ICC by the Security Council.

2. Truth and Reconciliation Commission

617. The Commission considers that a Truth and Reconciliation Commission could play an important role in ensuring justice and accountability. Criminal courts, by themselves, may not be suited to reveal the broadest spectrum of crimes that took place during a period of repression, in part because they may convict only on proof beyond a reasonable doubt. In situations of mass crime, such as have taken place in Darfur, a relatively limited number of

²²³ As stated above, the Commission however acknowledges that the final decision in this regard lies with the ICC Prosecutor.

prosecutions, no matter how successful, may not completely satisfy victims' expectations of acknowledgement of their suffering. What is important, in Sudan, is a full disclosure of the whole range of criminality.

618. The Commission has looked at several accountability mechanisms that formed part of certain Truth and Reconciliation Commissions (TRC). In one of these, amnesties were granted to perpetrators of serious violations of human rights and humanitarian law. Even though these amnesties were granted in exchange for public confessions by the perpetrators, they generally—and correctly so in the Commission's opinion—have been considered unacceptable in international law. They have also been widely considered a violation of the accepted United Nations position that there should be no amnesty for genocide, war crimes and crimes against humanity. However, in the same TRC (and in another one) some witnesses who were summoned under subpoena, and were compelled to testify against themselves, were granted "*use immunity*," in terms whereof they were assured that such information as they disclosed to the TRC would not be used against them in any criminal proceedings. "Use immunity" may be held to be acceptable in international law, at least in the circumstances of a TRC: it contributes to the revelation of truth. Perpetrators are constrained to reveal all, albeit on the limited assurance that their testimonies at the TRC will not be used against them in criminal proceedings. Nevertheless, society can hold them accountable for the crimes they admit to have committed, and they may still be prosecuted, the only evidence not usable against them being the one they gave at the TRC hearings.
619. In another TRC, criminal and civil liability for non-serious crimes (excluding murder and rape for example) could be extinguished, provided the perpetrators made a full disclosure of all their crimes, made apologies to their victims, and agreed to fulfil community service or paid reparations or compensation to the victims. All this happened in circumstances where the courts oversaw the whole process. This measure is a variant of the accountability mechanisms; it ensures that as many perpetrators as possible are revealed because they come forward, but they also pay some price to society—particularly to the victims. It is not an amnesty process as such; it is not unlike a plea bargaining arrangement between the State and the offender. The additional benefit of such an arrangement at the initiative of the TRC is that it becomes a process in which the community, and particularly the victims, become very directly involved.
620. In many contexts, therefore, TRCs have played an important role in promoting justice, uncovering truth, proposing reparations, and recommending reforms of abusive institutions.
621. Whether a TRC would be appropriate for Sudan, and at what stage it should be established, is a matter that only the Sudanese people should decide through a truly participatory process. These decisions should ideally occur (i) once the conflict is over and peace is re-established; (ii) as a complementary measure to criminal prosecution, which instead should be set in motion as soon as possible, even if the conflict is underway, with a view to having a deterrent effect, that is, stopping further violence; and (iii)

on the basis of an informed discussion among the broadest possible sections of Sudanese society which takes into account international experience and, on this basis, assesses the likely contribution of a TRC to Sudan. Recent international experience indicates that TRCs are likely to have credibility and impact only when their mandates and composition are determined on the basis of a broad consultative process, including civil society and victim groups. TRCs established for the purpose of substituting justice or producing a distorted truth should be avoided.

3. Strengthening the Sudanese Criminal Justice System

622. In the face of the rampant impunity in Darfur and in the Sudan it is essential that the Sudanese legal and judicial system be strengthened so as to be able to render justice in a manner that is consistent with human rights law.
623. It would first be advisable for Sudan to abolish the “specialized courts”, which have not proved in the least efficient in fighting impunity for crimes arising out of the state of emergency declared by the President. Sudan should also consider passing legislation designed to ensure the full independence and impartiality of the judiciary and provide it with adequate powers enabling it to address human rights violations.
624. Moreover, Sudan should consider providing training to its judges, prosecutor and investigators, to be given by international experts with an appropriate experience in training. Special emphasis should be laid on human rights law, humanitarian law, as well as international criminal. Special legislation and training should also be envisaged to improve the independence and impartiality of the judiciary.
625. It would also be important to recommend to the Sudanese authorities to repeal Article 33 of the National Security Force Act 1999, granting immunity from prosecution to any “member” or “collaborator” “for any act connected with the official work” of such persons. While the authorities have assured the Commission that immunity was automatically lifted where serious violations of international human rights or humanitarian law were committed, the Commission has not been able to verify, despite numerous formal requests, that this had indeed been the case. To the contrary, the Commission can only infer from the absence of any real prosecution of those responsible for the numerous crimes committed in Darfur that the aforementioned provision granting immunity has been, at least *de facto*, applied. This provision is in any case contrary to international law, at least if applied to serious violations of international human rights law and crimes against humanity. Immunities currently accruing to other public officials, such as members of the police, for human rights violations, should also be abolished.

SECTION V: CONCLUSIONS AND RECOMMENDATIONS

626. The people of Darfur have suffered enormously during the last few years. Their ordeal must remain at the centre of international attention. They have

been living a nightmare of violence and abuse that has stripped them of the very little they had. Thousands were killed, women were raped, villages were burned, homes destroyed, and belongings looted. About 1,8 million were forcibly displaced and became refugees or internally displaced persons. They need protection.

627. Establishing peace and ending the violence in Darfur are essential for improving the human rights situation. But real peace cannot be established without justice. The Sudanese justice system has unfortunately demonstrated that it is unable or unwilling to investigate and prosecute the alleged perpetrators of the war crimes and crimes against humanity committed in Darfur. It is absolutely essential that those perpetrators be brought to justice before a competent and credible international criminal court. It is also important that the victims of the crimes committed in Darfur be compensated.
628. The Sudan is a sovereign state and its territorial integrity must be respected. While the Commission acknowledges that the Sudan has the right to take measures to maintain or re-establish its authority and defend its territorial integrity, sovereignty entails responsibility. The Sudan is required not only to respect international law, but also to ensure its respect. It is regrettable that the Government of the Sudan has failed to protect the rights of its own people. The measures it has taken to counter the insurgency in Darfur have been in blatant violation of international law. The international community must therefore act immediately and take measures to ensure accountability. Those members of rebel groups that have committed serious violations of human rights and humanitarian law must also be held accountable.
629. Measures taken by all parties to the internal conflict in the Sudan must be in conformity with international law.

I. Factual and Legal Findings

630. In view of the findings noted in the various sections above, the Commission concludes that the Government of the Sudan and the Janjaweed are responsible for a number of violations of international human rights and humanitarian law. Some of these violations are very likely to amount to war crimes, and given the systematic and widespread pattern of many of the violations, they would also amount to crimes against humanity. The Commission further finds that the rebel movements are responsible for violations which would amount to war crimes.
631. In particular, the Commission finds that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present, or at least some rebels were hiding there, or that there were persons supporting rebels—a fact that the Commission has been unable to verify for lack of reliable evidence—the attackers did not take the necessary precautions to enable civilians to leave the villages or

to otherwise be shielded from attack. The impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels. In addition, it appears that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. From the viewpoint of international criminal law these violations of international humanitarian law no doubt constitute large-scale war crimes.

632. The Commission finds that large scale destruction of villages in Darfur has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government may not have participated in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene of destruction are sufficient to make them jointly responsible for the destruction. There was no military necessity for the destruction and devastation caused. The targets of destruction during the attacks under discussion were exclusively civilian objects. The destruction of so many civilian villages is clearly a violation of international human rights law and international humanitarian law and amounts to a very serious war crime.
633. The Commission considers that there is a consistent and reliable body of material which tends to show that numerous murders of civilians not taking part in the hostilities were committed both by the Government of the Sudan and the Janjaweed. It is undeniable that mass killing occurred in Darfur and that the killings were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population. The large number of killings, the apparent pattern of killing and the participation of officials or authorities are amongst the factors that lead the Commission to the conclusion that killings were conducted in both a widespread and systematic manner. The mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity.
634. It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a *crime against humanity*. The awareness of the perpetrators that their violent acts were part of a systematic attack on civilians may well be inferred from, among other things, the fact that they were cognizant that they would in fact enjoy impunity. The Commission finds that the crimes of sexual violence committed in Darfur may amount to rape as a crime against humanity, or sexual slavery as a crime against humanity.
635. The Commission considers that torture has formed an integral and consistent part of the attacks against civilians by Janjaweed and Government forces. Torture and inhuman and degrading treatment can be considered to have been committed in both a widespread and systematic manner, amounting to a crime against humanity. In addition, the Commission considers, that conditions in the Military Intelligence Detention Centre witnessed in Khartoum clearly amount to torture and thus constitute a serious violation of international human rights and humanitarian law.

636. It is estimated that more than 1,8 million persons have been forcibly displaced from their homes, and are now hosted in IDP sites throughout Darfur, as well as in refugee camps in Chad. The Commission finds that the forced displacement of the civilian population was both systematic and widespread, and such action would amount to a crime against humanity.
637. The Commission finds that the Janjaweed have abducted women, conduct which may amount to enforced disappearance as a crime against humanity. The incidents investigated establish that these abductions were systematic and were carried out with the acquiescence of the State, as the abductions followed combined attacks by Janjaweed and Government forces and took place in their presence and with their knowledge. The women were kept in captivity for a sufficiently long period of time, and their whereabouts were not known to their families throughout the period of their confinement. The Commission also finds that the restraints placed on the IDP population in camps, particularly women, by terrorizing them through acts of rape or killings or threats of violence to life or person by the Janjaweed, amount to severe deprivation of physical liberty in violation of rules of international law. The Commission also finds that the arrest and detention of persons by the State security apparatus and the Military Intelligence, including during attacks and intelligence operations against villages, apart from constituting serious violations of international human rights law, may also amount to the crime of enforced disappearance as a crime against humanity, as these acts were both systematic and widespread.
638. In a vast majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes, who were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion appears to have been directed to bring about the destruction of livelihoods and the means of survival of these populations. The Commission also considers that the killing, displacement, torture, rape and other sexual violence against civilians was of such a discriminatory character and may constitute persecution as a crime against humanity.
639. While the Commission did not find a systematic or a widespread pattern to violations committed by rebels, it nevertheless found credible evidence that members of the SLA and JEM are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage.

II. Do The Crimes Perpetrated in Darfur Constitute Acts of Genocide?

640. The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by

Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led members of African and Arab tribes to perceive themselves and others as two distinct ethnic groups. The rift between tribes, and the political polarization around the rebel opposition to the central authorities has extended itself to the issues of identity. The tribes in Darfur supporting rebels have increasingly come to be identified as "African" and those supporting the Government as "Arabs." However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

641. The Commission does recognize that in some instances, individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case-by-case basis.
642. The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from the gravity of the crimes perpetrated in that region. Depending upon the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished.

III. Who are The Perpetrators?

643. As requested by the Security Council, to "identify perpetrators" the Commission decided that the most appropriate standard was that requiring that there must be "a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime." The Commission therefore has not made final judgments as to criminal guilt; rather, it has made an assessment of possible suspects that will pave the way for future investigations, and possible indictments, by a prosecutor, and convictions by a court of law.
644. Those identified as possibly responsible for the above-mentioned violations consist of individual perpetrators, including officials of the Government of

the Sudan, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. Some Government officials, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. Others are identified for their possible involvement in planning and/or ordering the commission of international crimes, or of aiding and abetting the perpetration of such crimes. The Commission also has identified a number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes, and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels. The Commission has collected sufficient and consistent material (both testimonial and documentary) to point to numerous (51) suspects. Some of these persons are suspected of being responsible under more than one head of responsibility, and for more than one crime.

645. The Commission decided to withhold the names of these persons from the public domain. This decision is based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead will list the names in a sealed file that will be placed in the custody of the United Nations Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission's recommendations), who will use that material as he or she deems fit for his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor 646.
646. The Commission's mention of the number of individuals it has identified should not, however, be taken as an indication that the list is exhaustive. Numerous names of other possible perpetrators, who have been identified on the basis of insufficient evidence to name them as suspects can be found in the sealed body of evidentiary material handed over to the High Commissioner for Human Rights. Furthermore, the Commission has gathered substantial material on different influential individuals, institutions, groups of persons, or committees, which have played a significant role in the conflict in Darfur, including on planning, ordering, authorizing, and encouraging attacks. These include, but are not limited to, the military, the National Security and Intelligence Service, the Military Intelligence and the Security Committees in the three States of Darfur. These institutions should be carefully investigated so as to determine the possible criminal responsibility of individuals taking part in their activities and deliberations.

IV. The Commission's Recommendations Concerning Measures Designed to Ensure That Those Responsible are Held Accountable

1. Measures that should be taken by the Security Council

647. With regard to the judicial accountability mechanism, the Commission strongly recommends that the Security Council should refer the situation in Darfur to the International Criminal Court, pursuant to Article 13(b) of the Statute of the Court. Many of the alleged crimes documented in Darfur have been widespread and systematic. They meet all the thresholds of the Rome Statute for the International Criminal Court. The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes.
648. The Commission holds the view that resorting to the ICC would have at least six major merits. First, the International Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under Article 13 (b). The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus, is difficult or even impossible, resort to the ICC, the only truly international institution of criminal justice, which would ensure that justice be done. The fact that trials proceedings would be conducted in The Hague, the seat of the ICC, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the ICC, backed up by that of the United Nations Security Council, might impel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor. Fifth, the ICC could be activated immediately, without any delay (which would be the case if one were to establish ad hoc tribunals or so called mixed or internationalized
649. The Security Council should, however, act not only against the perpetrators but also on behalf of victims. In this respect, the Commission also proposes the establishment an International Compensation Commission, consisting of fifteen (15) members, ten (10) appointed by the United Nations Secretary-General and five (5) by an independent Sudanese body.

2. Action that should be taken by the Sudanese authorities

650. Government of the Sudan was put on notice concerning the alleged serious crimes that are taking place in Darfur. It was requested not only by the

international community, but more importantly by its own people, to put an end to the violations and to bring the perpetrators to justice. It must take serious measures to address these violations. The Commission of Inquiry therefore recommends the Government of the Sudan to:

1. end the impunity for the war crimes and crimes against humanity committed in Darfur. A number of measures must be taken in this respect. It is essential that Sudanese laws be brought in conformity with human rights standards through inter alia abolishing the provisions that permit the detention of individuals without judicial review, the provisions granting officials immunity from prosecution as well as the provisions on specialized courts;
2. respect the rights of IDPs and fully implement the Guiding Principles on Internal Displacement, particularly with regard to facilitating their voluntary return in safety and dignity;
3. strengthen the independence and impartiality of the judiciary and to confer on courts adequate powers to address human rights violations;
4. grant the International Committee of the Red Cross and the United Nations human rights monitors full and unimpeded access to all those detained in relation to the situation in Darfur;
5. ensure the protection of all the victims and witnesses of human rights violations, particularly those who were in contact with the Commission of Inquiry and ensure the protection of all human rights defenders;
6. with the help of international community, enhance the capacity of the Sudanese judiciary through the training of judges, prosecutors and lawyers. Emphasis should be laid on human rights law, humanitarian law, as well as international criminal law;
7. fully cooperate with the relevant human rights bodies and mechanisms of the United Nations and the African Union, particularly, the special representative of the United Nations Secretary-General on human rights defenders; and create through a broad consultative process, including civil society and victim groups, a truth and reconciliation commission once peace is established in Darfur.

3. Measures That Could be Taken by Other Bodies

651. The Commission also recommends that measures designed to break the cycle of impunity should include the exercise by other States of universal jurisdiction, as outlined elsewhere in this report.
652. Given the seriousness of the human rights situation in Darfur and its impact on the human rights situation in the Sudan, the Commission recommends that the Commission on Human Rights consider the re-establishment of the mandate of the Special Rapporteur on human rights in the Sudan.
653. The Commission recommends that the High Commissioner for Human Rights should issue public and periodic reports on the human rights situation in Darfur.

ANNEX 1. CURRICULA VITAE OF COMMISSION'S MEMBERS

Antonio Cassese (Chairman)

Professor Cassese was a Judge (1993–2000) and the first President (1993–97) of the International Criminal Tribunal for the Former Yugoslavia. He also served as a member of the Italian delegation to the United Nations Commission on Human Rights, the Council of Europe Steering Committee on Human Rights, and was President of the Council of Europe Committee Against Torture (1989–93).

He has taught international law at the University of Florence and the European University Institute in Florence. In 2002, he was the recipient of the prize granted by the *Academie Universelle des Cultures* presided over by Nobel Peace Prize winner, Elie Wiesel, 'for his exceptional contribution to the protection of human rights in Europe and the world'. Professor Cassese has published extensively on issues of international human rights and international criminal law and is the author of *International Law*, 2nd edn. (Oxford University Press, 2005) and *International Criminal Law* (Oxford University Press, 2003). He is the co-founder and co-editor of the *European Journal of International Law*, and founder and editor-in-chief of the *Journal of International Criminal Justice*.

He has been granted Doctorates *honoris causa* by the Erasmus University at Rotterdam, Paris XIII University and the University of Geneva, and is a member of the *Institut de droit international*.

Mohammed Fayek

Mohammed Fayek is the Secretary-General of the Arab Organization for Human Rights, a non-governmental organization which defends human rights in the Arab region. He is a member of the National Council for human rights in Egypt and the Egyptian Council for Foreign Affairs, and is Vice-President of the Egyptian Committee for Afro-Asian Solidarity. He is the owner and director-general of Dar El-Mustaqbal El-Arabi publishing house.

Mr Fayek has previously served in Egypt as Minister of Information, Minister of State for Foreign Affairs, Minister of National Guidance, and Chef de Cabinet and Advisor to the President for African and Asian Affairs. He was an elected member of the Egyptian Parliament for two consecutive terms for the Kasr El-Nil constituency in Cairo.

Hina Jilani

Hina Jilani has been the Special Representative of the Secretary-General on Human Rights Defenders since the establishment of the mandate in

2000. She is an Advocate of the Supreme Court of Pakistan and has been a human rights defender for many years, working in particular in favour of the rights of women, minorities and children. She was a co-founder of the first all-women law firm in Pakistan in 1980 and founded the country's first legal aid center in 1986.

Ms Jilani is the Secretary-General of the Human Rights Commission of Pakistan. She has been a member of the Council and Founding Board of International Council of Human Rights Policy; the Steering Committee of the Asia Pacific Forum for Women Law and Development; the International Human Rights Council at the Carter Centre; and the Women's Action Forum in Pakistan. She is a member of the District High Court and Supreme Court Bar Associations of Pakistan.

Dumisa Ntsebeza

In 1995, Dumisa Ntsebeza was appointed as a Commissioner on the Truth and Reconciliation Commission in South Africa. He led the Commission's Investigative Unit, was the Head of its Witness Protection Programme and served occasionally as Deputy and Acting Chair. Mr Ntsebeza is the founder and former president of the South African National Association of Democratic Lawyers, and a past President of South Africa's Black Lawyers Association. He has served as acting judge on the High Court of South Africa, as well as the South African Labour Court.

Mr Ntsebeza has lectured at the University of Transkei and chaired the institution's governing body, the University of Transkei Council. He has been a visiting Professor of Political Science and Law at the University of Connecticut. He is an advocate of the High Court of South Africa and a member of the Cape Bar, and currently holds chambers in Cape Town.

Therese Striggner-Scott

Ms. Striggner-Scott is a barrister and principal partner with a legal consulting firm in Accra, Ghana. She has served as Judge of the High Courts of Ghana and Zimbabwe, and was the Executive Chairperson of the Ghana Law Reform Commission from January 2000 to February 2004. She was a member of the Standing Commission of Inquiry Regarding Public Violence and Intimidation in South Africa ('the Goldstone Commission').

Ms Striggner-Scott has held various diplomatic titles including Ambassador of Ghana to France (with accreditations to Spain, Portugal, Greece and the Holy See, as well as UNESCO) and to Italy (with accreditations to Turkey, Croatia, Slovenia and Greece as well as the FAO, WFP and IFAD). She has served as a member of UNESCO's Legal Commission and was

an elected member of the organization's Executive Board. She was also a member of the Conventions and Recommendations Committee, the Executive Board's human rights body, and served as Chair of the Committee at the Executive Board's 140th session.

ANNEX 2. LIST OF OFFICIAL MEETINGS WITH THE GOVERNMENT OF THE SUDAN AND THE SLM/A AND THE JEM

1. Sudanese Governmental Representatives

A. Khartoum

- First Vice President, H.E. Ali Uthman Muhammad Taha
- Director General, National Security and Intelligence Service: Major General Sallah Gosh
- Minister of Justice: H.E. Ali Mohamed Osman Yasin
- Minister of Foreign Affairs: H.E. Mr. Mustafa Osman Ismail
- Minister of Interior and Special Representative of the President to Darfur: H.E. Mr. Abdel Rahim Mohammed Hussein
- State Minister for the Interior, H.E. Mr. Ahmed Mohammed Haroon
- Minister of Federal Affairs, H.E. Mr. Nafi Nafi
- Minister of International Cooperation: H.E. Mr. Yusuf Takana
- Minister of Defence: H.E. Mr. General Bakri Hassan Saleh
- Deputy Chief Justice and other Members of the Judiciary
- Deputy Director of Military Intelligence, General El Fadil
- Speaker of Parliament and Other Members
- Members of the National Commission of Inquiry in Darfur: Chairman Professor Dafa Allah Elhadj Yousuf
- Rapporteur of the Advisory Council for Human Rights: Mr. Abdelmonem Osman Mohamed Taha
- Members of the Rape Committee
- Members of the Committee on Darfur to assist the International Commission on Darfur, Chairman Major General Magzoub

B. North Darfur

- Governor—Wali of North Darfur: Mr. Kibul
- Army; Major General Ismat Abdulrahim Zeimat Abidi Director of operations in the ministry of Defence in Khartoum.
- Chief Prosecutor, Mr. Moulana El Gadi
- Chief Justice, Mr. Hisham Mohamed Youssef
- Police, Mr. Hassan Mohamed Ibrahim
- National Security, Deputy Director, Mr. Saleh Saddiq Mohamed

C. South Darfur

- Wali of South Darfur; Engineer Ata Al-AlMoneim
- General-Secretary of Government
- Chief Justice of South Darfur;
- Judge of Nyala Specialized Court, Mr. Murtar Ibrahim
- Director of National Security for South Darfur State, Colonel Abdel Razim
- Chief of Police of Nyala, Adedin El Taher Al Haj
- Chief of Police of Zalinguei
- Head of the 16th division in charge of South Darfur; Bridagier Abdallah Abdo;
- Head of military intelligence; Colonel Hoseith Abdelmelik Ahmedelsheik,
- Capt. Adel Youssif, legal adviser, head of the judiciary branch of the military;
- Members of the SLA and one of JEM, who are representatives of their movement to the AUCFC; Mohammed Adam and Ahmed Fadi, SLA and Magil Hassin, JEM

D. West Darfur

- Wali of West Darfur, Mr. Sulieman Abdalla Adam
- Chief Justice and members of the judiciary and the Specialized Courts, Court of Appeal, Public Court and District Court. A so-called "Legal Adviser to the Wali"
- Attorney General / Chief Prosecutor and the Legal adviser of the Wali.
- Minister of Cultural and Social Affairs and acting as Minister of Health; Deputy Wali; Mr. Jaffar Abdul Hakam,.
- Military Commander of West Darfur, 22nd Division–Name recorded as Brig-General Samsadin
- Deputy Commissioner of Police, El Geineina
- Meeting with the Head of National Security, West Darfur, El Geneina

2. SLM/A and JEM Representatives:

1. SLM/A

- Mr. Minawi Minnie Arkou, Chairman of Sudanese Liberation Movement/ Army (SLM/A).
- Military Commander and humanitarian Director Suleiman Jamos.
- Representative of the SLM/A in the AU CFC in three areas; El Fashir, El Geneina and Nyala

2. JEM

- Dr. Khalil Ibrahim Mohammed, Chairman of the Justice and Equality Movement (JEM),

ANNEX 3: PLACES VISITED IN THE SUDAN**1. Cities, towns, villages and sites**

- Abu Shok Camp
- Adwa
- Amika Sara
- Buram
- Deleig
- El Fashir
- El Geneina
- Fato Borno camp
- Garzila
- Habila
- Habilah
- Haloof
- Kabkabiya
- Kabkabiya
- Kass
- Khartoum
- Kulbus
- Kutum
- Mornei
- Nyala
- Shataya
- Taisha
- Tawila
- Towing
- Wadi Saleh
- Zalinguei
- Zalinguei
- Zam zam camp
- “School” IDP camp Kass
- Abeche, Chad
- Bredjing Refugee camp
- Camp of Kalma
- Camp of Nyala
- Camp of Otash
- Camp of Zalinguei
- Hamadiya camp Zalinguei

D. Detention centers

- National Security Detention center in Khartoum
- National Security Detention Centre in Nyala
- National Intelligence Detention Center in
- Khartoum Kober prison in Khartoum

Places visited outside the Sudan

- a. Eritrea, Asmara
- b. Ethiopia, Addis Ababa
- c. Chad, Abeche and Adré

ANNEX 3. LIST OF PUBLIC REPORTS ON DARFUR CONSULTED BY THE COMMISSION

The International Commission of Inquiry reviewed numerous reports, from both public and confidential sources, in relation to the conflict in Darfur. The following is a non exhaustive list of the public reports consulted by the Commission. The titles of non public reports are not listed for confidentiality purposes.

United Nations

1. United Nations: Darfur Region: Incidents of Violence Against Civilians Reported to the United Nations, February – September 2004
2. United Nations Inter-Agency Fact Finding and Rapid Assessment Mission, Kailek Town, South Darfur 25 April 2004,
3. Joint Communiqué between the Government of the Sudan and the Secretary General to the Sudan, 29 June – 3 July 04.
4. Report of the Secretary General pursuant to paragraphs 6 and 13 to 16 of the Security Council resolution 1556 (2004). S/2004/703
5. Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of Security Council resolution 1564 (2004), and paragraph 17 of Security Council resolution 1574 (2004). S/2004/947
6. Report of the Secretary-General on Sudan pursuant to paragraph 15 of Security Council Resolution 1564 of 18 September 2004, and paragraphs 6, 13 and 16 of Security Council resolution 1556 of 30 July 2004. October 2004
7. UN High Level Mission to Darfur, the Sudan, 27 April – 02 May 04
8. Security Council resolution 1547, S/RES/1547
9. Security Council resolution 1556, S/RES/1556
10. Security Council resolution 1564, S/RES/1564

Ohchr

11. OHCHR Fact finding Mission to Darfur Report E/CN.4/2005/3
12. OHCHR October, November and December 2004 reports.
13. The Final Report of the First African Regional Consultation on Violence Against Women With the Special Rapporteur Of the United Nations Commission on Human Rights On Violence Against Women And the Special Rapporteur of the African Commission on Human and Peoples' Rights on Women Rights; Khartoum 25 -16 September 2004.
14. Report of the UN HR Commission on extrajudicial, summary or arbitrary executions in S. & W. Sudan, E/CN.4/2005/7/Add.2, 6 August 2004
15. Report of the Representative of the Secretary-General on internally displaced persons, Francis M. Deng. E/CN.4/2005/8, 27 September 2004.

Ocha

16. Deteriorating security threatens to plunge Darfur into 'Chaos', Under-Secretary-General (OCHA) warns Security Council, SC/8262.

Sudan – Unct

17. Weekly Round up of current Developments UNCT (31 May-5 June)
18. Office of the UN Resident and Humanitarian Co-ordinator for the Sudan; 6 December 2003, 22 March 2004,
19. UNCT Darfur Update 26 July 2003

Unhcr

20. UNHCR; The Darfur Crisis and Chad Mediation

Unicef

21. UNICEF reports; Challenges of socio-cultural reconstruction and unity in Southern Sudan, 7 Jan 2004

Who

22. Restrospective Mortality Survey; Among the Internally Displaced Population, Greater Darfur Sudan, August 2004.

African Union Reports

22. Cease Fire Agreement and Protocol 08 April 2004
23. CFC Commission Agreement 28 May 2004

24. Conference Agreement 25 April 2004
25. Humanitarian Protocol 09 November 2004
26. Press Release 02 December 2004
27. Security Protocol 09 November 2004
28. Status of Mission Agreement 04 June 2004
29. Commission Ceasfire Report on the Incident in Dar Essalam and Wada General Area
30. Report of the Ceasfire Commission on the Situation in Darfur Conflict at the Joint Commission Meeting Held in N'Djamena, Tchad by Brigadier General Fo Okonkwo Chairman Ceasfire Commisison on 4 October 2004
31. Brief for the members of the joint Commisison for the Darfur Peace Talks in Abuja Nigeria by Brigadier General Fo Okonkwo, Chairman Ceasfire Commission, 23 August 2004

Inter Governmental organizations reports

33. Arab League report on its mission to Darfur
34. Report of the Organization of Islamic Conference on its mission to Darfur
35. Report of the ad hoc delegation of the Committee on Development and Cooperation on its
36. mission to Sudan from 19 to 24 February 2004, CR/528901EN.doc

Governmental reports

37. US Department of State Report Documenting Atrocities in Darfur, September 2004
38. CRS Report for Congress. Sudan: The Darfur Crisis and the Status of North-South Negotiations, 22 October 2004
39. The Use of Rape as a Weapon of War in the Conflict in Darfur Sudan, October 2004

List of Media and Press articles

68. Open-Range Management and Property Rights in Pastoral Africa—A Case of Spontaneous Range Enclosure in South Darfur, Sudan, by Roy H. Behnke jr, August 1985.
69. Pastoral Land Tenure and Agricultural Expansion: Sudan and the Horn of Africa
70. Transcript of the Panorama Programme from 14 November 2004
71. Arabizing an Africa Capital: What if government brings up the African face of Sudan? Mahgoub El-Tigani, December 11, 2004
72. Feature-Darfur 'A hundred days of failure', Wednesday December 15th, 2004 02:43. By Jim Lobe

73. (EU) EU/SUDAN: EU to mobilise extra 80 million EUR to support enlarged African Union mission to make Darfur safe
39. Violence against women: The unacknowledged casualties of war, Irene Khan International Herald Tribune, Saturday, December 18, 2004
40. Presidents of Chad and Sudan Meet to Discuss Rebellion in Western Sudan, 04/13/03 Presidents of Chad and Sudan Meet to Discuss Rebellion in Western Sudan, 04/13/03, AP.

List of International NGO reports

41. Sudanese Organization Against Torture
 - Human Rights Report on Darfur May- October 04
 - Darfur-The Tragedy Continues; 28 November 2004
 - Alternative Report to the African Commission- May 2004
42. Sudanese Human Rights Organization
 - Sudanese Human Rights Quarterly. Issue 17, February 2004.
 - Issue N°.16–October 2003
 - Quarterly Issue N°. 15, June 2003
 - Quarterly Issue N°.14, October 2002
 - Quarterly Issue N°. 12, January 2002
 - The Situation of Human Rights in Sudan, 26 March 2003
 - Report on the situation of Human Rights in Sudan, October 1, 2003 – January 31, 2004, 5 February 2004
43. Amnesty International
 - Sudan, Darfur “Too Many people killed for no reason”, 3 February 2004
 - Darfur: Extrajudicial execution of 168 men, April 2004
 - Darfur Incommunicado detention, torture and special courts 8 June 2004
 - Sudan: At the mercy of killers – destruction of villages in Darfur, June 2004
 - Sudan, Darfur Rape as a weapon of war Sexual violence and its consequences, July 2004
 - Sudan: Arming the perpetrators of grave abuses in Darfur, 16 November 2004
 - Sudan: Intimidation and denial, Attacks on freedom of expression in Darfur, August 2004
 - Sudan No one to complain to: No respite for the victims, impunity for the perpetrators. 2 December 2004.
 - Sudan, who will answer for the crimes? January 2005
44. Human Rights Watch
 - Sudan, Darfur in Flames: Atrocities in Western Sudan April 2004, Vol. 16, No. 5 (a)

- Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan May 2004, Vol. 16, No. 6 (a)
- Darfur Documents Confirm Government Policy of Militia Support, A Human Rights Watch Briefing Paper, 19 July 2004
- Empty Promises? Continuing Abuses in Darfur Sudan, A Human Rights Watch Briefing Paper, 11 August 2004
- Sudan Janjaweed Camps Still Active, Human Rights Watch 27 August 2004
- Addressing crimes against humanity and “ethnic cleansing” in Darfur, Sudan, Human Rights Watch, May 24, 2004
- “If we return we will be killed” Consolidated Ethnic Cleansing in Darfur, Sudan November 2004

45. International Crisis Group

- Darfur Deadline: A New International Action Plan, Africa report No83, 23 August 2004
- Darfur Rising: Sudan’s New Crisis, ICG Africa Report No76, 25 March 2004
- Sudan: Now or Never in Darfur, Africa Report No80, 23 May 2004
- Sudan: Towards an Incomplete Peace, ICG Africa Report No73, 11 December 2003
- Sudan’s Dual Crises: Refocusing on IGAD, Africa Briefing, 05 October 2004

46. AEGIS

- Darfur: Management of a Genocidal Crisis, November 2004, Report 201/04

ANNEX 4. OVERVIEW OF THE ACTIVITIES BY THE INVESTIGATIVE TEAMS OF THE COMMISSION

The Commission’s investigation team was led by a Chief Investigator and included four judicial investigators, two female investigators specializing in gender violence, four forensic experts from the Argentine Forensic Anthropology Team and two military analysts.

Investigation team members interviewed witnesses and officials in Khartoum and accompanied the Commissioners on their field mission to the three Darfur States. The investigation team was then split into three sub-teams which were deployed to North, South and West Darfur.

West Darfur Team

The team for West Darfur was composed of two investigators, a military analyst and supported by one or two forensic experts, according to requirements. The team also had two interpreters working for it. The team was based in Al-Geneina for a total of 36 days, first from 27 November

to 18 December 2004, and, in 2005, between 5 and 18 January. One of the investigators also accompanied the Commissioners during their visit to West Darfur and Chad, in early November 2004.

The West Darfur team conducted thirteen visits to towns and villages outside of Al-Geneina, for a total of 16 days, mostly through travel by road but also by way of 4 helicopter trips to more distant locations. The areas covered by the team included most of Al-Geneina, Kulbus and Habilah localities, while parts of Wadi Salih locality were also visited.

In all, the team collected information concerning attacks on 51 towns or villages and 11 cases of rapes, through interviews from 116 eyewitnesses and 12 circumstantial witnesses.

Through that process, members of the team met with representatives from most of the tribal groups in West Darfur, including Arab nomads. The team also held meetings with government officials, including representatives from the military, police, judiciary and administration, as well as meetings with representatives from the rebel groups (SLA and JEM). In addition to meetings with witnesses, the team further held discussions with representatives from international NGOs, United Nations Agencies and the AU.

North Darfur Team

The team in North Darfur was composed of two investigators, one analyst and members of the Forensic Team, used on a shared basis with the West and South teams. The team also employed interpreters and drivers to facilitate the mission.

The initial mission into El Fashir took place with the Commissioners on 11 November 2004. During this mission, government officials, witnesses, NGO's and other individuals were interviewed. The team returned to Khartoum with the Commissioners on the 17 November 2004. The team was due to redeployed into El Fashir on the 27 November 2004, however at this time a State of Emergency in North Darfur was declared by the Government because of continued fighting between the SLA and GOS and due to this and security concerns, deployment was not possible. The team was assigned to assist the West Darfur Team in their investigation, until such time the security situation eased.

The team was later diverted to South Darfur where it assisted in ongoing investigations. The team spent from the 1 December 2004 to 6 December 2004 based in Nyala and then the team redeployed to El Fashir until 19

December. During this period it carried out enquiries at specific targeted locations, such as IDP camps, SLA contacts, destroyed villages and government officials. A close liaison was also formed with the African Union mission. The final deployment for the team was from 4 January 2005 to 19 January 2005, during which time it concentrated on specific targets that could not be reached during the first mission. Places such as Tawila village, Kutum and Fato Bournou IDP camp are examples. A number of Government officials (military) were interviewed at length.

In total the North Darfur team interview 141 witness, covering 98 separate incidents, thirteen involving GoS only, twenty-one involving Janjaweed only and 37 involving a combination of GoS and Janjaweed. Twenty six witness were interview regarding incidents involving SLA and JEM. Seven crime scenes were visited.

South Darfur Team

The Investigative Team for South Darfur (Nyala) was composed of three investigators. Earlier the team was supported by forensic experts and investigators from other teams for several days. In addition the team had two male interpreters working for it. An international female interpreter joined the team in the final stages of the investigation to assist—particularly in sexual assault matters.

The team was based in Nyala for a total of 36 days, first from 27 November to 18 December 2004, and, in the 2005, between 5 and 18 January.

The South Darfur team conducted seven visits to towns and villages outside Nyala and Kass through travel by road but also by way of four helicopter trips to areas when road were closed for security reasons.

The South Darfur Team concentrated mainly on six case studies—namely the Kailek group of towns and villages, Hallof, Taisha, Adwa, Ami Kasara and Buram collecting detailed information on each of these cases—including the versions of the suspected parties. The team also collected information on a very recent attack on a village which occurred on 14 January 2005.

In addition the team collected information concerning 39 rape and sexual assault cases. A number of interviews were conducted with Government officials. The team also interviewed representatives from JEM and SLA. Finally the team held discussions with representatives from international NGOs, United Nations Agencies and the AU.

The Forensic team conducted crime scene examinations in 16 areas.

DOCUMENT 5

Following the UN Commission of Inquiry's on Darfur, the matter of the Darfur crisis was referred to the International Criminal Court's Office of the Prosecutor via United Nations Security Council Resolution 1593 (2005) "which affirmed that justice and accountability are critical to achieve lasting peace and security in Darfur." Subsequently, the ICC Prosecutor, Luis Moreno-Ocampo, conducted a vast and intensive investigation into the crisis in Darfur and the events that took place therein from March 2003 through July 14, 2008. On July 14, 2008, Moreno-Ocampo submitted an application for the issuance of a warrant of arrest for Sudanese President Omar al Bashir to the International Criminal Court. In the Application Moreno-Ocampo notes that during the course of the investigation, the prosecutorial team amassed statements and evidence during the course of 105 missions conducted in eighteen countries.

In his Application ("Situation in Darfur, The Sudan: Summary of the Case, Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad al Bashir"), the Prosecutor addresses the following: the purpose of the application, background and scope of the investigation, the jurisdiction of the investigation and case, the focus of the investigation itself, the issue of the admissibility of the case, summary of the evidence and information provided in the prosecution's application, the context in which crimes were committed, the type of crimes that were allegedly perpetrated, and the personal responsibility of Omar Hassan Ahmad al Bashir.

In addressing the above, ICC Prosecutor Luis Moreno-Ocampo notes, in part, the following: the Prosecution concluded that there were reasonable grounds to believe that Sudanese President Omar al Bashir "bears criminal responsibility for the crime of genocide under Article 6 (a) of the Rome Statute, killing members of the Fur, Masalit and Zaghawa ethnic groups (also referred to as 'target groups'), (b) causing serious bodily or mental harm to members of those groups, and (c) deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part"; al Bashir's actions "simultaneously constitutes genocide against the Fur, Masalit and Zaghawa ethnic groups, crimes against humanity and war crimes against any civilian population in the area, including members of the target groups"; and "the evidence establishes reasonable grounds to believe that al Bashir intends to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups as such." The Prosecutor further notes that "Consistent with the requirements of

Article 58 (2)(d) of the Statute, the Prosecution furnished in the Application 'a summary of the evidence' sufficient to establish 'reasonable grounds to believe' that Omar Hassan Ahmad al Bashir committed crimes within the jurisdiction of the Court."

SITUATION IN DARFUR, THE SUDAN: SUMMARY OF THE CASE, PROSECUTOR'S APPLICATION FOR WARRANT OF ARREST UNDER ARTICLE 58 AGAINST OMAR HASSAN AHMAD AL BASHIR, INTERNATIONAL CRIMINAL COURT, JULY 14, 2008

I. THE APPLICATION

Upon investigation of crimes allegedly committed in the territory of Darfur, the Sudan, on or after 1 July 2002, the Prosecution has concluded that there are reasonable grounds to believe that Omar Hassan Ahmad AL BASHIR (hereafter referred to as "AL BASHIR") bears criminal responsibility for the **crime of genocide** under Article 6 (a) of the Rome Statute, killing members of the Fur, Masalit and Zaghawa ethnic groups (also referred to as "target groups"), (b) causing serious bodily or mental harm to members of those groups, and (c) deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part; for **crimes against humanity** under Article 7 (1) of the Statute, committed as part of a widespread and systematic attack directed against the civilian population of Darfur with knowledge of the attack, the acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture, and (g) rapes; and for **war crimes** under Article 8 (2)(e)(i) of the Statute, for intentionally directing attacks against the civilian population as such, and (v) pillaging a town or place.

The Prosecution does not allege that AL BASHIR physically or directly carried out any of the crimes. He committed crimes through members of the state apparatus, the army and the Militia/Janjaweed in accordance with Article 25 (3)(a) of the Statute (indirect perpetration or perpetration by means).

At all times relevant to this Application, AL BASHIR has been President of the Republic of the Sudan, exercising both *de jure* and *de facto* sovereign authority, Head of the National Congress Party and Commander in Chief of the Armed Forces. He sits at the apex of, and personally directs, the state's hierarchical structure of authority and the integration of the

Militia/Janjaweed within such structure. He is the mastermind behind the alleged crimes. He has absolute control.

The evidence establishes reasonable grounds to believe that AL BASHIR intends to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups as such. Forces and agents controlled by AL BASHIR attacked civilians in towns and villages inhabited by the target groups, committing killings, rapes, torture and destroying means of livelihood. AL BASHIR has thus forced the displacement of a substantial part of the target groups and attacked them in the camps for internally displaced persons ("IDPs"), causing serious and bodily harm—through rapes, tortures and forced displacement in traumatizing conditions—and deliberately inflicting on a substantial part of those groups conditions of life calculated to bring about their physical destruction.

AL BASHIR's conduct simultaneously constitutes genocide against the Fur, Masalit and Zaghawa ethnic groups, crimes against humanity and war crimes against any civilian population in the area, including members of the target groups.

The case proposed in this Application is the second case in the Situation and covers crimes committed in Darfur from March 2003 to the date of filing this Application. This case is not being investigated or prosecuted by the Government of the Sudan ("GoS").

II. BACKGROUND AND SCOPE OF THE INVESTIGATION

Jurisdiction

The Darfur situation was referred to the Office of the Prosecutor by United Nations Security Council Resolution 1593 (2005) which affirmed that justice and accountability are critical to achieve lasting peace and security in Darfur.

Investigation

Since the start of the investigation, the Prosecution has collected statements and evidence during 105 missions conducted in 18 countries. Throughout the investigation, the Prosecutor has examined incriminating and exonerating facts in an independent and impartial manner.

For the purpose of the Application, the Prosecution has relied primarily on: (1) witness statements taken from eyewitnesses and victims of attacks

in Darfur; (2) recorded interviews of GoS officials; (3) statements taken from individuals who possess knowledge of the activities of officials and representatives of the GoS and of the Militia/Janjaweed in the conflict in Darfur; (4) documents and other information provided by the GoS upon request of the Prosecution; (5) the Report of the UN Commission of Inquiry (“UNCOI”) and other materials provided by the UNCOI; (6) the Report of Sudanese National Commission of Inquiry (“NCOI”) and other materials provided by the NCOI; and (7) documents and other materials obtained from open sources.

Throughout the investigation the Prosecution monitored the security of victims and witnesses and implemented protective measures. The Prosecution and the Victims and Witness Unit of the Registry continue to monitor and assess the risks to victims and witnesses.

Admissibility

The case proposed in this Application is the second case in the Situation and covers crimes committed in Darfur from March 2003 to the date of filing. In accordance with the principle of “complementarity,” at all times the Prosecution has assessed the existence of national proceedings in the Sudan in relation to those crimes. However, this case is not being investigated or prosecuted by the GoS. There are not national proceedings in the Sudan against the perpetrators of crimes relevant to this Application. The prosecution is aware of the incarceration of officers who refused to comply with AL BASHIR’s orders to commit genocide.

III. SUMMARY OF THE EVIDENCE AND INFORMATION PROVIDED IN THE PROSECUTION’S APPLICATION

Consistent with the requirements of Article 58 (2)(d) of the Statute, the Prosecution furnished in the Application “a summary of the evidence” sufficient to establish “reasonable grounds to believe” that Omar Hassan Ahmad AL BASHIR committed crimes within the jurisdiction of the Court.

a. The Context in which Crimes were Committed

Since he assumed power in June 1989, AL BASHIR has engaged in political and military struggles with groups both in Khartoum and in the peripheries of the Sudan seen as threats to his power. In Darfur, he assessed that the Fur, Masalit and Zaghawa ethnic groups, as socially and politically dominant groups in the province, constituted such threats: they challenged the economic and political marginalization of their region, and members of the three groups engaged in armed rebellions.

AL BASHIR set out to quell those movements through armed force and, over the years, also employed a policy of exploiting real or perceived grievances between the different tribes struggling to prosper in the difficult Darfur environment. He promoted the idea of a polarization between tribes aligned with the Government, whom he labeled “Arabs,” and the three groups he perceived as the main threats, whom he labeled “Zurgas” or “Africans.” The image is only one of many devices used by AL BASHIR to disguise his crimes. Both victims and perpetrators are “Africans” and speak “Arabic.”

In March 2003, after negotiations and armed action both failed to end in Darfur a rebellion whose members belonged mostly to the three target groups, AL BASHIR decided and set out to destroy in part the Fur, Masalit and Zaghawa groups, on account of their ethnicity. His motives were largely political. His pretext was a “counterinsurgency.” His intent was genocide.

The Fur, Masalit and Zaghawa speak Arabic and share with the majority of the Darfur population the same religion (Islam). Co-existence and intermarriage have blurred differences. However historically they occupied specific territories (Dar Fur, Dar Masalit and Dar Zaghawa), and also spoke their own languages, different from one another and from Arabic. Members of the groups see themselves, and are seen by their attackers, as different ethnic groups.

b. The Crimes

Genocide by killing members of the target groups

From March 2003 up to the date of filing, AL BASHIR’s orders giving “*carte blanche*” to his subordinates to quell the rebellion and take no prisoners triggered a series of brutal attacks against the Fur, Masalit and Zaghawa groups. The Armed Forces, often acting together with Militia/Janjaweed, singled out for attack those villages and small towns inhabited mainly by members of the target groups. The attackers went out of their way to spare from attack villages inhabited predominantly by other tribes considered aligned with the Government, even where they were located very near villages inhabited predominantly by members of the targeted groups. The Prosecution has charted all the known attacks that have taken place from 2003–2008 on an interactive map of Darfur, showing towns, villages and the tribal composition of the inhabitants (available on the ICC OTP website). The results show that the overwhelming majority of villages attacked were inhabited mainly by the target groups. They were clearly selected for attack.

The Armed Forces and Militia/Janjaweed carried out such attacks jointly and in a similar pattern throughout the entire period, up to the date of filing. Typically, the Armed Forces would arrive in trucks and land cruisers mounted with Dshkas, and the Militia/Janjaweed would arrive on camels and horseback. These joint forces would then surround the village and on occasion, the Air Force would be called upon to drop bombs on the village as a precursor to the attacks. The ground forces would then enter the village or town and attack civilian inhabitants. They kill men, children, elderly, women; they subject women and girls to massive rapes. They burn and loot the villages.

The targets are not rebel forces, but the Fur, Masalit and Zaghawa communities. Attacks are typically launched against civilian targets, and do not cease until the town or village, in its entirety, has been victimized and its population forcibly displaced, regardless of the lack of rebel presence or the lack of any valid military objective. Witnesses have also described instances in which rebels were known to be located outside of towns or villages, but attackers from the Armed Forces and Militia/Janjaweed bypassed those locations to attack the towns or villages instead.

An armed conflict has existed in Darfur since 2003. The Government has the right to use force to defend itself against insurgents. However the crimes covered in the Application are not the collateral damage of a military campaign. At all times relevant to the Application AL BASHIR specifically and purposefully targeted civilians who were not participants to any conflict with the intent to destroy them, as a group.

In Darfur 35,000 people have been killed outright in such attacks; an overwhelming majority of them are from the three target groups.

The fate of the displaced persons

Almost the entire population of the target groups has been forcibly displaced following the attacks. Data from refugee camps in Chad and camps for internally displaced persons ("IDP camps") within Darfur confirm that most of those displaced belong to the target groups.

As of December 2007, the total number of Sudanese people from Darfur in refugee camps in Chad was approximately 235,000. Of those, there were approximately 110,000 Zaghawa and approximately 103,000 Masalit. Only approximately 7,750 members of the Fur had reached Chad, due to their geographical location in the south of Darfur.

According to information, the Fur represent 50% up to the totality of some IDP camps in Darfur. In South Darfur, Kalma camp, near Nyala, which

hosts around 92,000 IDPs, there are an estimated 46 to 50,000 Fur, 9,000 Zaghawa and 5,000 Masalit. In West Darfur, Nertiti (Jebel Marra) hosts mostly Fur (about 32,000); Hassa Hissa near Zalingei hosts about 85% Fur (42,500), 10% Zaghawa (5,000), 5% Masalit (2,500) and smaller tribes. The Fur represent 99% (about 30,000) of the population of Hamadiya camp near Zalingei and 90% (about 16,000) in Deleig camp near Wali Sadih.

In the view of the UNCOI in January 2005, there would be no policy of genocide if *“the populations surviving attacks on villages ... live together in areas selected by the government ... where they are assisted.”* Notwithstanding the evidence that genocide was committed by killing and the infliction of serious bodily and mental harm, the current evidence also shows that the target groups, far from being assisted, are also attacked in the camps. Such attacks, as described below, against such an overwhelming majority of members of the target groups, are a clear indication of **AL BASHIR**’s genocidal intent.

Genocide by causing serious mental harm to members of the target group

As a result of the attacks to the villages, at least 2,700,000 people, most of them members of the target groups, have been forcibly expelled from their homes. As survivors fled the attacks, they were pursued into deserts, killed or left to die. Those who managed to reach the outskirts of bigger cities and what would become IDP camps are submitted to physical and mental harm, and generally conditions calculated to slowly bring about their destruction.

- i. Thousands of women and girls belonging to the target groups were and continue to be raped in all three States of Darfur by members of the Militia/Janjaweed and Armed Forces since 2003. Girls as young as 5 years old have been raped. A third of the rapes are rapes of children. Underreporting of rape is widespread. Nonetheless, periodic reports and testimonies conclude that rape has been committed systematically and continuously for 5 years. Women and girls going to collect firewood, grass or water are repeatedly raped by Militia/Janjaweed, Armed Forces and other GoS security agents: *“when we see them, we run. Some of us succeed in getting away, and some are caught and taken to be raped—gang-raped. Maybe around 20 men rape one woman.... [...] These things are normal for us here in Darfur. These things happen all the time. I have seen rapes too. It does not matter who sees them raping the women—they don’t care. They rape women in front of their mothers and fathers.”* Rape is an integral part of the pattern of destruction that the Government of the Sudan is inflicting upon the target groups in Darfur. As described by the ICTR in the *Akayesu* case, they use rape to kill the will, the spirit, and life itself.

Particularly in view of the social stigma associated with rape and other forms of sexual violence among the Fur, Masalit and Zaghawa, these acts cause

significant and irreversible harm, to individual women, but also to their communities.

- ii. Massive forced displacement was, and continues to be, conducted in such a manner as to traumatize the victims and prevent the reconstitution of the group. AL BASHIR's criminal plan has violently uprooted at least 2.7 million civilians—principally members of the target groups—from lands on which they and their ancestors had been living for centuries. Victims suffer the trauma of being forced to witness their own homes and possessions destroyed and/or looted and family members raped and/or killed. The victims thereafter endure the anguish of learning that, in many cases, prior homelands have been occupied and resettled by members of other communities—and thus, there is no prospect of ever returning. Organized insecurity in and around the camps by AL BASHIR's forces and agents, including through spying and harassment by members of the Humanitarian Aid Commission ("HAC"), exacerbates the fear of IDPs. The cumulative effect of the crimes described above is that many of the surviving members of the target groups, in particular those in IDP camps, suffer serious mental and/or psychological harm.

Genocide by deliberate infliction on members of the target groups conditions of life calculated to bring about the physical destruction of the group in whole or in part

- i. The attacks on villages across Darfur from March 2003 to the present were designed not only to kill members of the target groups and force them from their lands, but also to destroy the very means of survival of the groups as such. They destroy food, wells and water pumping machines, shelter, crops and livestock, as well as any physical structures capable of sustaining life or commerce. They destroy farms and loot grain stores or set them on fire. The goal is to ensure that those inhabitants not killed outright would not be able to survive without assistance.
- ii. The survivors are not only forced out of their homes, they are also pursued into inhospitable terrain. A victim in the desert overheard one attacker say to another: *"Don't waste the bullet, they've got nothing to eat and they will die from hunger."*
- iii. In addition to persecuting the victims, the attackers spoliage their land, now occupied by new settlers: *"This land is liberated and you have no land and no right to cultivate on liberated areas."* Usurpation of the land is often the final blow to the capacity of the target groups to survive in Darfur. Land has always been identified as a key issue, by AL BASHIR himself. In his April 2003 address to the Armed Forces and PDF troops at El Fashir airport, AL BASHIR declared, *"I only want land."* Having removed the target groups from their land, and destroyed their means of survival, AL BASHIR encourages and facilitates resettlement of the land by other tribes more supportive of the government, often affiliated with Militia/Janjaweed. The scale of displacements was done in the knowledge of the devastating impact it would have on the fabric of the groups, whose identity is linked with the land. When they were removed from the land, the tribal structure was weakened.

- iv. They also attack the target groups in the camps. AL BASHIR and his subordinates systematically refuse to provide any meaningful aid, and hinder other efforts to bring humanitarian aid to the 2,450,000 civilians displaced. Thus after forcibly expelling members of the target groups from their homes, they subject them to, at best, a subsistence diet and the reduction of essential medical services below minimum requirements.

In the IDP camps, where most of the target groups' members fled, AL BASHIR has organized the destitution, insecurity and harassment of the survivors. The Ministry for Humanitarian Affairs provides no meaningful Government aid to those displaced, and consistently obstructs or blocks humanitarian assistance from the international community. The Ministry for Humanitarian Affairs blocks the publication of nutrition surveys, delays the delivery of aid, expels relief staff denouncing such acts, denies visas and travel permits, and imposes unnecessary bureaucratic requirements on aid workers. This has the effect of reducing nutrition and access to medical services for protracted periods of time.

Militia/Janjaweed, which AL BASHIR has recruited, armed and purposefully refused to disarm, are stationed in the vicinity of the camps and, with other GoS agents, they subject IDPs to abuses, including killings, rapes and other sexual violence. While the authorities argue that there are armed rebels in the camps, the evidence shows that those attacked are unarmed civilians.

The overall effect of physical attack, forced displacement, destruction of means of livelihood, and denial of humanitarian assistance was that mortality rates among civilians, including principally members of the target groups, remained at critical levels. Between April and June 2004, as deaths directly caused by violence decreased, mortality rates among displaced populations in Darfur remained elevated because of deficient humanitarian assistance. Overall, at least 100,000 civilians—mostly members of the targeted groups—have already endured “slow death” since March 2003.

Crimes against humanity

Charges of crimes against humanity are also required to represent the full extent of criminal activity in Darfur since 2003, namely the acts of murder, rape, forcible displacement and extermination committed against members of the target groups and other, smaller ethnic groups, such as the Tunjur, Erenga, Birgid, Misseriya Jebel, Meidob, Dajo and Birgo. While the attacks against these groups were carried out on discriminatory grounds, there is insufficient evidence at this time to substantiate a charge of genocide in respect of these groups.

War crimes

At all times relevant to the charges, the Government of the Sudan has been engaged in a military campaign conducted in Darfur against rebel armed forces including the SLM/A and the JEM. Both rebel groups mainly recruit from the Fur, Masalit and Zaghawa tribes. As is well known, the GoS has relied on Militia/Janjaweed.

AL BASHIR also committed, through other persons, the war crime of pillaging towns and villages in Darfur, including but not limited to Kodoom, Bindisi, Mukjar, Arawala, Shataya, Kailek, Buram, Muhajeriya, Siraf Jidad, Silea, Sirba, Abu Suruj and villages in the area of Jebel Mun.

c. The Personal Responsibility of Omar Hassan Ahmad AL BASHIR

AL BASHIR controls and directs the perpetrators. The commission of those crimes on such a scale, and for such a long period of time, the targeting of civilians and in particular the Fur, Masalit and Zaghawa, the impunity enjoyed by the perpetrators, and the systematic cover-up of the crimes through public official statements, are evidence of a plan based on the mobilization of the state apparatus, including the armed forces, the intelligence services, the diplomatic and public information bureaucracies, and the justice system.

AL BASHIR designed a plan that includes: the dismissal of staff opposed to crimes and the appointment of key personnel to implement the crimes, most significantly Ahmed Harun; the integration of the Militia/Janjaweed, their leaders formally appointed into the Sudanese structure of authority; the unified implementation of attacks against the target groups in villages through the Security Committees at the locality level, reporting to State Security Committees, reporting, during 2003–2005 to Ahmed Harun as head of the “Darfur Security Desk” and member of the National Security Council; the sophisticated system of obstacles to the delivery of humanitarian aid; the misinformation campaign; and the deliberate failure to punish perpetrators.

AL BASHIR controls the implementation of such a plan through his formal role at the apex of all state structures and as Commander in Chief and by ensuring that the heads of relevant institutions involved report directly to him through formal or informal lines. His control is absolute.

Because the magnitude of the crimes attracted national and international scrutiny, AL BASHIR consistently denies, conceals and distances himself and his subordinates from the crimes committed. Throughout the time

period relevant to this Application, AL BASHIR personally and through his subordinates denies that crimes are taking place. AL BASHIR uses the Sudanese Intelligence and Security Service (“NISS”) to further manipulate local and international public opinion concerning Darfur through the NISS-controlled Sudan Media Centre (“SMC”), which was established in December 2002 and disseminates directives to all officials to contribute to the campaign by highlighting stories about voluntary returns of IDPs, and by conveying that Darfur is a safe place where people can lead a normal life.

Given the international attention to Darfur, genocide by imposing conditions calculated to bring about physical destruction, in combination with a studied misinformation strategy, is an efficient strategy to achieve complete destruction. By preventing the truth about the crimes from being revealed; by concealing his crimes under the guise of a “counterinsurgency strategy,” or “inter tribal clashes,” or the “actions of lawless autonomous militia”; by threatening Sudanese citizens—and trying to blackmail the international community—into silence, AL BASHIR makes possible the commission of further crimes.

AL BASHIR denies victims access to the criminal justice system, while using the system against those who did not comply with his genocidal orders. AL BASHIR protects, promotes and provides impunity to his subordinates, in order to secure their willingness to continue committing crimes. He could authorize investigations of members of the armed and security forces, but the only officers investigated are those who refused to participate in crimes. AL BASHIR promoted notorious perpetrators (Musa Hilal, Shukurtallah, Abdallah Masar and General Ismat), but his most telling acts concern ICC indictee Ahmed Harun.

Ahmad Harun as Minister of State for the Interior, responsible for the “Darfur Security desk,” recruited and mobilized the Militia/Janjaweed, relying on experience he had gained in mobilizing tribal militias in South Sudan in the 1990s. On various occasions, Ahmad Harun publicly acknowledged his mission to destroy the target groups, stating that AL BASHIR had given him the power to kill whomever he wanted and that, *“for the sake of Darfur, they were ready to kill three quarters of the people in Darfur, so that one quarter could live.”* After the Court’s decision of 27 April 2007, AL BASHIR traveled to Darfur with Harun and announced publicly that he would never hand over Harun to the ICC; to the contrary, Harun would continue working in Darfur to implement his orders. The decision to maintain Harun in such positions as Minister of State for Humanitarian Affairs, where he was able to affect the victims in the camps; as Chair of a committee on human rights violations in the south and north, in which

he could provide perpetrators with a guarantee of impunity; as a member of the UNAMID national monitoring group, where he was able to affect the deployment of peacekeepers; these are all clear indications of AL BASHIR's complete protection of those who committed genocidal acts under his direct orders.

d. AL BASHIR's *mens rea*

AL BASHIR has genocidal intent. His forces and agents submitted a substantial part of each target group—living in IDP camps—to conditions calculated to destroy each group in part.

In attacks, AL BASHIR forces consistently made statements such as *"the Fur are slaves, we will kill them"*; *"You are Zaghawa tribes, you are slaves"*; *"You are Masalit. Why do you come here, why do you take our grass? You will not take anything today."* The language used by perpetrators of rape made also clear the genocidal intent underlying their actions: *"After they abused us, they told us now we would have Arab babies and if they could find any Fur woman, they would rape them again to change the colour of their children."* Perpetrators of other crimes have used language which is not just ethnically derogatory, but evidencing an intention to destroy: *"You are blacks, no blacks can stay here, and no black can stay in Sudan ... The power of Al BASHIR belong to the Arabs and we will kill you until the end"*; *"we will kill all the black"*; *"we will drive you out of this land"*; *"we are here to eradicate blacks (nuba)"*; *"This is your end. The Government armed me."*

The systematic targeting of victims based on their membership in a particular group; the actual destructions; the deliberate failure to differentiate between civilians and persons of military status; the perpetration of acts which violate the very foundation of the groups such as massive rapes or massive expulsion from the land with no possibility to return or reconstitute as a group; the utterances of perpetrators on the ethnicity of the victims during the attacks; the sophisticated strategy of concealing crimes; and the evidence of a plan are many indicators from which *mens rea* of genocide is the only possible inference.

Assessed against all those factors, the only reasonable inference available based on the evidence is that AL BASHIR intends to destroy substantial parts of the Fur, Masalit and Zaghawa groups, as such.

III. ENSURING THE APPEARANCE OF AL BASHIR

Under Article 58 of the Statute, if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that a person has committed

crimes within the jurisdiction of the Court, the Chamber may issue upon the application of the Prosecution either a warrant of arrest or a summons to appear. The Prosecution, by this application, submits that the evidence and information summarised above give reasonable grounds to believe that the person, AL BASHIR, committed the crimes alleged. The Prosecution respectfully requests the issuance of an arrest warrant.

There are circumstances which could lead it to modify its assessment. The Prosecution submits that a summons to appear could be an alternative pursued by the Court should the Government of the Sudan, which would serve and follow up on the summons, and the individual concerned, express their willingness to pursue this route.

DOCUMENT 6

*This entry consists of two parts: (1) the Majority Opinion of the ICC Pre-Trial Judges regarding the ICC Prosecutor's application for a warrant for the arrest of Sudanese President Omar al Bashir on charges of crimes against humanity, war crimes, and genocide; (2) and the "partly dissenting opinion" of one of the ICC Judges, Ms. Anita Usacka. The three ICC judges dealing with the case all agreed that al Bashir should be charged with crimes against humanity and war crimes, but two judges ("the Majority") ruled that ICC Prosecutor Luis Moreno-Ocampo did not provide evidence that was compelling enough to merit issuing a warrant for genocide. More specifically, the Majority argued, in part, the following: "As a result of previous findings, and as the Prosecution itself acknowledges, the Prosecution's allegations concerning the existence of reasonable grounds to believe in the GoS's [Government of Sudan] genocidal intent are essentially based on the inference that can be drawn from the alleged clear pattern of mass-atrocities committed by GoS forces between 2003 and 2008 against the Fur, Masalit and Zaghawa civilian population throughout Darfur region. . . . [Based upon the evidence provided by the Prosecutor,] the Majority considers that the existence of reasonable grounds to believe that the GoS acted with genocidal intent is not the only reasonable conclusion of the alleged commission by GoS forces, in a widespread and systematic manner, of the particularly serious war crimes and crimes against humanity mentioned above; . . . The Majority observes that the Prosecution acknowledges that it has no direct evidence of the GoS's genocidal intent and that it therefore relies on proof by inference; . . . The Majority agrees with the Prosecution in that such a standard would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS's *dolus specialis* specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups. As a result, the Majority considers that, if the existence of the GoS's genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met; . . . Despite the particular seriousness of those war crimes and crimes against humanity that appeared to have been committed by GoS forces in Darfur between 2003 and 2008, a number of materials provided by the Prosecution point to the existence of several factors indicating that the commission of such crimes can reasonably be explained by reasons other than the existence of the GoS's genocidal intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups; . . .*

As a result, the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application fail to provide reasonable grounds to believe that the GoS acted with dolus specialis/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups, and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to counts 1 to 3."

In a "partly dissenting opinion," Judge Anita Usacka stated that she disagreed with the Majority decision vis-à-vis the issue of genocide, and argued that the Majority's argument was erroneous. In doing so, Judge Usacka argued as follows: "I disagree with the Majority, [in that] I am satisfied that there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent and is criminally responsible for genocide. This difference results from a divergence of opinion regarding (i) whether the Prosecution must demonstrate, in order to establish reasonable grounds, that the only reasonable inference available on the evidence is that of genocidal intent, and; (ii) the conclusions drawn from the analysis of the evidence presented. It is clear to me that the terms of article 58 of the [Rome] Statute [of the International Criminal Court] should be construed in a manner which is consistent with the fact that the Prosecution must meet an increasingly demanding evidentiary threshold at each stage of the proceedings. In other words, when presenting evidence to support the issuance of a warrant of arrest, the Prosecution should not be required to meet an evidentiary threshold which would be also sufficient to support a conclusion beyond a reasonable doubt at trial." Following an analysis of the Prosecutor's Application and the evidence he presented for his request for a warrant to charge al Bashir with genocide, Judge Usacka asserts that "On the basis of the foregoing evidence, I am satisfied that there are reasonable grounds to issue an arrest warrant on the basis of the existence of reasonable grounds to believe that Omar Al Bashir has committed the crime of genocide. Accordingly, I respectfully dissent from the Majority's decision not to issue an arrest warrant on the basis of genocide."

Undoubtedly, Judge Usacka's dissenting opinion added fuel to the ICC Prosecutor's belief that the Majority had erred in its judgment, thus prompting the Prosecutor to file an appeal with the ICC Appeals Chamber.

**DECISION ON THE PROSECUTION'S APPLICATION
FOR A WARRANT OF ARREST AGAINST OMAR
HASSAN AHMAD AL BASHIR AND SEPARATE AND
PARTLY DISSENTING OPINION OF ICC JUDGE ANITA
USACKA, INTERNATIONAL CRIMINAL COURT, PUBLIC
REDACTED VERSION, MARCH 4, 2009**

PRE-TRIAL CHAMBER I

**Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Usacka
Judge Sylvia Steiner**

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court,” respectively) has been seized of the Prosecution’s Application for a warrant of arrest, filed on 14 July 2008 pursuant to article 58(1) of the *Rome Statute* (“the Statute”), in the investigation of the situation in Darfur, Sudan. Having examined the written and oral submissions of the Prosecution, the Chamber

RENDERS THIS DECISION.

I. BACKGROUND

1. On 31 March 2005, the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593¹ referring the situation in Darfur, Sudan since 1 July 2002 (“the Darfur situation”) to the Prosecutor of the International Criminal Court, in accordance with article 13(b) of the Statute.
2. On 21 April 2005, the Presidency issued a decision assigning the Darfur situation to the Chamber, pursuant to regulation 46 of the *Regulations of the Court* (“the Regulations”).²
3. On 1 June 2005, the Prosecution informed the Chamber of its decision to initiate an investigation into the Darfur situation, pursuant to article 53 of the Statute and rule 104 of the *Rules of Procedure and Evidence* (“the Rules”).³
4. On 14 July 2008, the Prosecution filed an application under article 58⁴ (“the Prosecution Application”) requesting the issuance of a warrant of arrest against Omar Hassan Ahmad Al Bashir (hereinafter referred to as “Omar Al Bashir”) for his alleged criminal responsibility in the commission of genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups in Darfur from 2003 to 14 July 2008.
5. On 19 September 2008, the Chamber issued a “Decision Convening a Hearing”⁵ whereby an *ex parte* hearing with the Prosecution was convened and held on Wednesday 1 October 2008.⁶
6. On 15 October 2008, the Chamber issued a “Decision Requesting Additional Supporting Materials in relation to the Prosecution’s Request for a Warrant of

¹ United Nations Security Council Resolution 1593, S/RES/1593 (2005), issued on 31 March 2005 (hereinafter the “UN Security Council Resolution, S/RES/1593 (2005)”).

² ICC-02/05-1-Corr.

³ ICC-02/05-2.

⁴ ICC-02/05-151-US-Exp and ICC-02/05-151-US-Exp-Anxsl-89; Corrigendum ICC 02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxsl & 2. Public redacted version of the Prosecution Application, ICC-02/05-157-AnxA (hereinafter referred to throughout the present decision as “the Prosecution Application”).

⁵ ICC-02/05-158.

⁶ ICC-02/05-T-2-Conf-Exp-ENG ET.

Arrest against Omar Hassan Al Bashir,”⁷ in which the Chamber requested the Prosecution to provide the Chamber with additional supporting materials.

7. On 17 November 2008, the Prosecution filed its additional supporting materials in the “Prosecution’s Submission of Further Information in Compliance with “Decision Requesting Additional Supporting Materials in relation to the Prosecution’s Request for a Warrant of Arrest against Omar Hassan Al Bashir” dated 15 October 2008.”⁸
8. On 11 January 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed the “Application on behalf of Citizens’ Organisations of The Sudan in relation to the Prosecutor’s Applications for Arrest Warrants of 14 July 2008 and 20 November 2008,”⁹ whereby they requested, pursuant to rule 103 of the Rules, the leave of the Chamber to make written and oral submissions on the following matters:

The Applicants request that no arrest warrants are issued by the Pre-Trial Chamber at this time on grounds that (1) issuing such warrants would have grave implications for the peace building process in Sudan and that deference must be given to considerations of national interest and security; (2) that the interests of justice will not be served particularly in light of the Prosecutor’s conduct in bringing these applications; (3) that such warrants could entrench the negative perceptions of the ICC and thus contribute to a deterioration of the situation in Sudan; and, (4) that alternative means of transitional justice and resolution are being and will pursued without the need for any consideration of involvement of the ICC at this stage.¹⁰

9. On 30 January 2009, the Chamber issued the “Decision scheduling an *Ex Parte* Hearing and Providing an Agenda,”¹¹ thereby scheduling an *ex parte* hearing which was held in closed session with the Prosecution, the Registry and Victims and Witnesses Unit on 3 February 2009.¹²
10. On 3 February 2009, the Prosecution filed the “Prosecution’s written submissions Pursuant to “Decision scheduling an *Ex Parte* Hearing and Providing an Agenda” dated 30 January 2009.”¹³
11. On 3 February 2009, the Registry filed its “First report of the Registry in relation to the “Decision scheduling an *Ex Parte* Hearing and Providing an Agenda” of 30 January 2009.”¹⁴

⁷ICC-02/05-160 and ICC-02/05-160-Conf-Exp-Anxl.

⁸ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J.

⁹ICC-02/05-170.

¹⁰ICC-02/05-170, para. 8.

¹¹ICC-02/05-176 and ICC-02/05-176-Conf-Exp-Anxl.

¹²ICC-02/05-T-4-Conf-Exp-ENG ET.

¹³ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxsl-5.

¹⁴ICC-02/05-181-Conf-Exp.

12. On 4 February 2009, the Prosecution filed the "Provision of Information Pursuant to PTC I Request Made During Hearing on 3 February 2009."¹⁵
13. On 4 February 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed the "Supplement to the Application and Annexes to the Application on behalf of Citizens' Organisations of The Sudan in relation to the Prosecutor's Applications for Warrants of 14 July 2008 and 20 November 2008,"¹⁶ in which they provided further information in support of their request under rule 103 of the Rules.
14. On 5 February 2009, the Chamber issued the "Decision Requesting Additional Information from the Prosecution and the Registry."¹⁷
15. On 5 February 2009, the Chamber issued the "Decision on Application under Rule 103,"¹⁸ in which the Chamber rejected the request made by the Sudan Workers Trade Unions Federation and the Sudan International Defence Group pursuant to rule 103 of the Rules as, according to the Statute and the Rules, "the Chamber neither has the power to review, nor is it responsible for, the Prosecution's assessment that, under the current circumstances in Sudan, the initiation of a case against Omar Al Bashir and three alleged commanders of organised armed groups would not be detrimental to the interests of justice."¹⁹
16. On 6 February 2009, the Prosecution filed the "Prosecution's Additional Submissions Pursuant to Undertaking made during the Hearing on 3 February 2009."²⁰
17. On 11 February 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed the "Application for Leave to Appeal Against Decision on Application under Rule 103."²¹
18. On 13 February 2009, the Prosecution filed the "Prosecution's Submission of Information Pursuant to Decision of PTC I of 4 February 2009."²²
19. On 16 February 2009, the Registry filed the "Additional information from the Registry pursuant to the "Decision Requesting Additional Information from the Prosecution and the Registry" dated 4 February 2009."²³
20. On 19 February 2009, the Chamber issued the "Decision on the Application for Leave to Appeal Against Decision on Application under Rule 103."²⁴

¹⁵ ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E.

¹⁶ ICC-02/05-182.

¹⁷ ICC-02/05-184-Conf-Exp.

¹⁸ ICC-02/05-185.

¹⁹ ICC-02/05-185, para. 29.

²⁰ ICC-02/05-186-US-Exp.

²¹ ICC-02/05-187.

²² ICC-02/05-188-US-Exp.

²³ ICC-02/05-190-US-Exp.

²⁴ ICC-02/05-192.

21. On 23 February 2009, the Chamber issued the “Public notice of the Decision on the Prosecution’s Application under article 58 of the Statute”²⁵ in which the Chamber declared that “the decision of the Chamber on the Prosecution Application shall be issued on 4 March 2009 and filed publicly on the same date.”

II. PRELIMINARY REMARKS

22. In the Prosecution Application, the Prosecution requests that a warrant of arrest be issued for Omar Al Bashir for his alleged responsibility in the commission of genocide, crimes against humanity and war crimes against the members of the Fur, Masalit and Zaghawa groups in Darfur from March 2003 to the date of filing of the Prosecution Application on 14 July 2008.²⁶
23. The Prosecution also submits that had Omar Al Bashir shown any willingness to appear before this Court, issuing a summons to appear could have been a viable alternative.²⁷
24. At the outset, the Chamber emphasises that (i) it falls within the discretion of the Prosecution to decide which materials to present to the Chamber in support of the Prosecution Application for a warrant of arrest against Omar Al Bashir;²⁸ and that (ii) the present decision is solely based on the materials provided by the Prosecution in support of the Prosecution Application.²⁹
25. In this regard, the Chamber notes that article 58(1) of the Statute provides that:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- a. There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- b. The arrest of the person appears necessary:
 - (i). To ensure the person’s appearance at trial,
 - (ii). To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - (iii). Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

²⁵ ICC-02/05-193.

²⁶ *The Prosecution Application*, para. 413.

²⁷ *The Prosecution Application*, para. 414.

²⁸ The same approach was followed in the cases of *The Prosecutor v Thomas Lubanga Dyilo* and *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*. See in particular ICC-01/04-01/06-2-IEN, p. 2; ICC-01/04-01/07-I-tENG, p. 2; ICC 01/04-01/07-32 and Annexes.

²⁹ The materials in support of the Prosecution Application include the Prosecution filings of 14 July 2008, 17 November 2008 and all materials submitted in relation to the hearings held on 1 October 2008 and 3 February 2009.

26. The Chamber also observes that article 58(7) of the Statute provides that:

As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear.

27. As the Chamber has already held, the term "committed" in article 58(1) or (7) of the Statute includes:

- (i). The commission *stricto sensu* of a crime by a person "as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible";
- (ii). Any other forms of accessory, as opposed to principal, liability provided for in article 25 (3) (b) to (d) of the Statute;
- (iii). An attempt to commit any of the crimes provided for in articles 6 to 8 of the Statute;
- (iv). Direct and public incitement to commit genocide (the only preparatory act punishable under the Statute); and
- (v). The responsibility of commanders and other superiors under article 28 of the Statute.³⁰

28. Accordingly, the Chamber is of the view that the Prosecution Application for the issuance of a warrant of arrest for Omar Al Bashir can only be granted if the Chamber is convinced that the three following questions are answered affirmatively:

- (i). Are there reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed?
- (ii). Are there reasonable grounds to believe that Omar Al Bashir has incurred criminal liability for such crime under any of the modes of liability provided for in the Statute?
- (iii). Does the arrest of Omar Al Bashir appear to be necessary under article 58(1) of the Statute?³¹

29. According to article 58(7) of the Statute, the Chamber would only issue a summons to appear for Omar Al Bashir if it is convinced that the first two questions are answered in the affirmative, but his arrest does not appear to be necessary under article 58(1) of the Statute.³²

30. If the Chamber is not convinced that both of the two first questions are answered affirmatively, it shall decline to issue any warrant of arrest or summons to appear for Omar Al Bashir.

³⁰ ICC-01/04-520-Anx2, para. 92.

³¹ ICC-01/04-01/06-2-tEN; ICC-01/04-01/07-4.

³² ICC-02/05-01/07-2-Corr, p. 2.

31. Furthermore, if the Chamber decides to issue a warrant of arrest or summons to appear, it shall only issue it in relation to those specific crimes for which it is convinced that the first two above-mentioned questions are answered in the affirmative.
32. This interpretation of article 58(1) and (7) of the Statute is, in the Chamber's view, the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5(1)(c) of the *European Convention on Human Rights*³³ and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the *American Convention on Human Rights*.³⁴
33. Finally, the Chamber highlights that, in discussing whether the Chamber is convinced that the "reasonable grounds to believe" standard and the "appearance" standard required by article 58(1) of the Statute have been met, the Chamber, although under no obligation to do so, will often refer to the materials provided by the Prosecution in support of the Prosecution Application.
34. Nevertheless, the Chamber underscores that the conclusions reached by the Chamber in relation to the findings made in the present decision are not only based on the specific materials expressly discussed, but they are made on the basis of an overall assessment of all information provided by the Prosecution in support of the Prosecution Application.

III. WHETHER THE CASE AGAINST OMAR AL BASHIR FALLS WITHIN THE JURISDICTION OF THE COURT AND IS ADMISSIBLE

A. The case against Omar Al Bashir falls within the jurisdiction of the Court

35. Article 19(1) of the Statute requires the Chamber to satisfy itself that any case brought before it falls within the jurisdiction of the Court.

³³ According to the European Court of Human Rights ("the ECHR"), the reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary deprivation of liberty. See ECHR, *Case of Fox, Campbell and Hartley v United Kingdom*, "Judgment," 30 August 1990, Application No. 12244/86; 12245/86; 12383/86, paras. 31–36. ECHR, *Case of K-F v Germany*, "Judgment," 27 November 1997, Application No. 144/1996/765/962, para. 57. ECHR, *Case of Labita v Italy*, "Judgment," 6 April 2000, Application No. 26772/95, paras. 155–161; ECHR, *Case of Berklay v Turkey*, "Judgment," 1st March 2001, Application No. 22493/93, para. 199; ECHR, *Case of O'Hara v. United Kingdom*, "Judgment," 16 October 2001, Application No. 37555/97. paras. 34–44.

³⁴ See for instance, Inter-American Court of Human Rights ("the IACHR"), *Case of Bamaca Velasquez v. Guatemala*, "Judgment," 25 November 2000, Series C No.70. paras. 138–144, *Case of Loayza Tamayo v Peru*, "Judgment", 17 September 1997, Series C No.33, paras. 49–55, and IACHR, *Case of Gangaram-Panday v Suriname*, "Judgment," 21 January 1994, Series C No. 16, paras. 46–51.

36. In this regard, the Chamber previously stated that:

[. . .] a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.³⁵

To fall within the Court's jurisdiction, a crime must meet the following three conditions: it must be one of the crimes mentioned in article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in article 11 of the Statute; and the crimes must meet one of the two alternative conditions described in article 12 of the Statute.³⁶

[. . .] article 12 (2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute.³⁷

37. In relation to the jurisdiction *ratione loci* and *ratione temporis*, the Chamber recalls that the 31 March 2005 referral by the Security Council pursuant to article 13(b) of the Statute³⁸ and the 1 June 2005 Prosecution's decision to open an investigation pursuant to article 53(1) of the Statute³⁹ define the territorial and temporal parameters of the Darfur situation encompassing the territory of the region of Darfur in Sudan (which includes the States of Northern Darfur, Southern Darfur and Western Darfur) since 1 July 2002.

38. The Chamber also notes that the Prosecution Application refers to conduct, including unlawful attacks against civilians, murder, extermination, rape, torture, forcible transfer and pillage, alleged to have taken place from March 2003 to the time of the filing of the Prosecution Application on 14 July 2008, in areas and villages of the Darfur region.

39. In relation to the jurisdiction *ratione materiae*, the Chamber observes that, according to the Prosecution, the said conducts give rise to genocide, crimes against humanity and war crimes⁴⁰ insofar as they:

- i. took place in the context of an armed conflict not of international character on the territory of the Darfur region, which had already started in March 2003 and continued through July 2008;⁴¹

³⁵ ICC-01/04-01/06-8-Corr, para. 21.

³⁶ ICC-01/04-101-tEN, para. 85.

³⁷ ICC-02/05-01/07-I-Corr, para. 16.

³⁸ *The Prosecution Application*, para. 2; See also UN Security Council Resolution, S/RES/1593 (2005).

³⁹ ICC-02/05-2.

⁴⁰ In particular, those provided for in articles 6(a), (b) and (c), 7(l)(a), (b), (d), (f), and (g); and 8(2)(e)(i) and (v) of the Statute. *The Prosecution Application*, paras. 1 and 62.

⁴¹ *The Prosecution Application*, paras. 9, 240 and 355.

- ii. were part of a widespread or systematic attack directed against the civilian Fur, Masalit and Zaghawa population of Darfur, which started after a speech allegedly given by Omar Al Bashir in El Fächer (Northern Darfur) in March 2003, and continued through July 2008;⁴² and
 - iii. were not only intended to destroy a substantial part of the Fur, Masalit and Zaghawa groups as such, but could by themselves effect such destruction or were at least part of a manifest pattern of similar conduct against the targeted groups.⁴³
40. Finally, in relation to the jurisdiction *ratione personae*, the Chamber considers that, insofar as the Darfur situation has been referred to the Court by the Security Council, acting pursuant to article 13(b) of the Statute, the present case falls within the jurisdiction of the Court despite the fact that it refers to the alleged criminal liability of a national of a State that is not party to the Statute, for crimes which have been allegedly committed in the territory of a State not party to the Statute.
41. Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case.
42. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which "must not go unpunished."⁴⁴
43. Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute provide for the following core principles:
- i. "This Statute shall apply equally to all persons without any distinction based on official capacity";
 - ii. "[...] official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence"; and
 - iii. "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."
44. Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute,

⁴² *The Prosecution Application*, paras. 9, 16, 29–31 and 65.

⁴³ *The Prosecution Application*, para. 10.

⁴⁴ Preamble of the Statute, paras. 4 and 5.

can only be resorted to when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* and article 21(3) of the Statute.⁴⁵

45. Fourth, as the Chamber has recently highlighted in its 5 February 2009 “Decision on Application under Rule 103,” by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.⁴⁶

B. No ostensible cause or self-evident factor impels the Chamber to exercise its discretion to determine the admissibility of the case against Omar Al Bashir at this stage

46. The second sentence of article 19(1) of the Statute bestows upon the Chamber a discretionary *proprio motu* power to determine the admissibility of a case:

The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

47. Nevertheless, the Chamber observes that the Appeals Chamber, in its 13 July 2006 Judgment,⁴⁷ held that when, as in the present case,⁴⁸ the Prosecution Application is made on a *confidential* and *ex parte* basis, the Chamber, for the purpose of preserving the interests of the relevant person, must exercise its discretion under article 19(1) of the Statute only in exceptional circumstances,⁴⁹ such as when an “ostensible cause” or a “self-evident factor” impels the exercise of such discretion.⁵⁰

48. In this regard, the Chamber has already held that:

[. . .] the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible

⁴⁵ ICC-01/04-168, paras. 22–24, 32–33 and 39.

⁴⁶ ICC-01/05-185, para. 31.

⁴⁷ ICC-01/04-169.

⁴⁸ The Chamber also notes that the proceedings for the issuance of warrant of arrest remain confidential and *ex parte*, despite the fact that the Prosecution has filed a public summary of its Application in the record of the Darfur situation. *The Prosecution Application*, paras. 72–74.

⁴⁹ ICC-01/04-169, para. 52.

⁵⁰ ICC-01/04-169, para. 53.

only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17(l)(a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court.⁵¹ According to such definition:

any case arising from an investigation before the Court will meet the gravity threshold provided for in article 17(l)(d) of the Statute if the following three questions can be answered affirmatively:

1. Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct);
2. Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and
3. Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crime within the jurisdiction of the Court; and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?

Nevertheless, the Appeals Chamber, in its *obiter dicta* provided for in its 13 July 2006 Decision, stated that this definition of article 17(l)(d) gravity threshold was flawed (ICC-01/04-169, para. 82).

49. The Chamber notes that, in the Prosecution Application, the Prosecution does not raise any issues of admissibility, except to highlight that this case is not being investigated or prosecuted in Sudan.⁵²
50. Further, in the view of the Chamber, the materials presented by the Prosecution in support of the Prosecution Application offer no indication that: (i) national proceedings may be conducted, or may have been conducted, at the national level against Omar Al Bashir for any of the crimes contained in the Prosecution Application; or that (ii) the gravity threshold provided for in article 17(l)(d) of the Statute may not be met.
51. In light of the above-mentioned, the Chamber declines to use its discretionary *proprio motu* power to determine, at this stage, the admissibility of the case against Omar Al Bashir as: (i) the Prosecution Application still remains *confidential* and *ex parte*; and (ii) there is no ostensible cause or self-evident factor

⁵¹ CC-01/04-520-Anx2, paras. 29 and 64. In its 10 February 2006 Decision, the Chamber put forward the only existing definition of article 17(l)(d) gravity threshold provided for to date in the jurisprudence of the Court.

⁵² *The Prosecution Application*, para. 3.

which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute.

IV. WHETHER THE COMMON REQUIREMENTS UNDER ARTICLE 58(1) OF THE STATUTE FOR THE ISSUANCE OF A WARRANT OF ARREST HAVE BEEN MET

A. Whether there are reasonable grounds to believe that at least one of the crimes within the jurisdiction of the Court referred to in the Prosecution Application has been committed

52. As the Chamber has already held:

[. . .] according to the Statute and the Elements of Crimes, the definition of every crime within the jurisdiction of the Court includes both contextual and specific elements.⁵³

53. Hence, the Chamber will first analyse whether there are reasonable grounds to believe that the contextual elements of the crimes alleged by the Prosecution in the Prosecution Application are present, and only if the answer is in the affirmative, will the Chamber turn its attention to the question as to whether there are reasonable grounds to believe that the specific elements of any such crime have been met.

54. Moreover, although the Prosecution Application focuses, for the most part, on the three counts of genocide, the Chamber observes that, according to the Prosecution, the alleged crimes were committed as part of a counter-insurgency campaign launched in March 2003 by the Government of Sudan ("the GoS").⁵⁴ Hence, the Chamber will first analyse the Prosecution's allegations concerning war crimes and crimes against humanity, and only then will the Chamber turn its attention to the Prosecution's allegations relating to the crime of genocide.

1. War crimes

(a) Whether there are reasonable grounds to believe that the contextual elements of at least one war crime within the jurisdiction of the Court have been met

55. The Prosecution submits that Omar Al Bashir used, from March 2003 to the date of filing of the Prosecution Application on 14 July 2008, the "apparatus" of the State of Sudan, including the Sudan People's Armed Forces ("the Sudanese Armed Forces") and their allied militia groups known as "Janjaweed Militia" (primarily drawn from so-called Arab tribes), the Sudanese Police Forces, the

⁵³ ICC-01/04-520-Anx2, para. 94.

⁵⁴ *The Prosecution Application*, paras. 9–11.

National Intelligence and Security Service (“the NISS”) and the Humanitarian Aid Commission (“the HAC”), to commit acts constituting war crimes under paragraphs (2)(e)(i) and (2)(e)(v) of article 8 of the Statute.⁵⁵

56. In particular, the Prosecution alleges that between March 2003 and 14 July 2008, GoS forces⁵⁶ conducted hundreds of unlawful attacks on towns and villages throughout the Darfur region inhabited by members of the Fur, Masalit and Zaghawa groups.⁵⁷
57. According to the Prosecution Application, this conduct took place in the context of an armed conflict, which, by reference to paragraphs (2)(e)(i) and (2)(e)(v) of article 8 of the Statute, the Prosecution appears to characterise as an armed conflict not of an international character.⁵⁸
58. In this regard, the Chamber observes that article 8(2)(f) of the Statute, which defines “armed conflicts not of an international character” for the purpose of article 8(2)(e) of the Statute, states that:

Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State where there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.

59. As the Chamber has already held in relation to these types of armed conflicts:

[. . .] in addition to the requirement that the violence must be sustained and have reached a certain degree of intensity, Article 1.1 of the Protocol Additional II provides that the armed groups must: (i) be under responsible command implying some degree of organisation of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the implementation of the Protocol; and (ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations.⁵⁹

The ICTY Appeals Chamber has held that an armed conflict not of an international character exists whenever there is a resort to ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’ This definition echoes the two criteria of Protocol Additional II, except that the ability to carry out sustained and concerted military operations is no longer linked to territorial control. It follows that the involvement of

⁵⁵ *The Prosecution Application*, para. 39.

⁵⁶ Unless otherwise expressly provided, the term “GoS’ forces” is used hereinafter to refer to the forces of the Government of Sudan, which included *inter alia*, the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.

⁵⁷ *The Prosecution Application*, para. 237.

⁵⁸ *The Prosecution Application*, paras. 1 and 9.

⁵⁹ ICC-01/04-01/06-803-tEN, para. 232.

armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character.⁶⁰

60. The Chamber has also highlighted that article 8(2)(f) of the Statute makes reference to “protracted armed conflict between [. . .] organized armed groups,” and that, in the view of the Chamber, this focuses on the need for the organised armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time.⁶¹ In this regard, the Chamber observes that, to date, control over the territory by the relevant organised armed groups has been a key factor in determining whether they had the ability to carry out military operations for a prolonged period of time.⁶²
61. According to the Prosecution, since March 2003, an armed conflict has existed in the Darfur region between (i) the GoS; and (ii) the Sudan Liberation Movement/Army (“the SLM/A”), the Justice and Equality movement (“the JEM”) and other opposition armed groups seeking political change in the Darfur region.⁶³
62. In this regard, the Chamber considers that there are reasonable grounds to believe that the SLM/A and the JEM (i) were the two main groups opposing the GoS in Darfur; (ii) organised themselves between 2001 and 2002; and (iii) began to resort to acts of armed violence in 2002.⁶⁴ Moreover, despite internal disputes and splits, the Chamber considers that there are reasonable grounds to believe that, since at least March 2003, both the SLM/A and the JEM fulfil the organisational requirements contained in article 8(2)(f) of the Statute.⁶⁵
63. Concerning the ability to carry out sustained military operations for a prolonged period of time, the Chamber considers that there are reasonable grounds to believe that the SLM/A and the JEM were involved in numerous military operations against GoS forces, such as those carried out (i) at the end of 2002/beginning of 2003 in the Jebel Marra locality,⁶⁶ (ii) in March/April

⁶⁰ ICC-01/04-01/06-803-tEN. para. 233.

⁶¹ ICC-01/04-01/06-803-tEN. para. 234.

⁶² ICC-01/04-01/07-717, para. 239.

⁶³ *The Prosecution Application*, paras. 9 and 240.

⁶⁴ Human Rights Watch (hereinafter “HRW”) Report, *Sudan Darfur in Flames—Atrocities in Western Sudan* (Anx 10) DAR-OTP-0003-0185 at 0194; International Crisis Group Report, *Darfur Deadline A New International Action Plan*, 23 August 2004 (Anx 11) DAR-OTP-0004-0055 at 0057, 0059, 0061, 0064, 0065, 0068; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025- 0027, 0030-0040, 0058; HRW, *If We Return, We Will Be Killed- Consolidation of Ethnic Cleansing in Darfur, Sudan*, November 2004 (Anx 38) DAR-OTP-0107-1403 at 1405.

⁶⁵ *The Prosecution Application*, paras. 241–242; J. Flint/A, de Waal, *Darfur. A Short History of a Long War*, 2005 (Anx 75) DAR-OTP-0120-0678 at 0772-0775. Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3–4 September 2003 at DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement at DAR-OTP-0115-0563 at 0567-0638.

⁶⁶ Witness Statement (Anx 81) DAR-OTP-0148-0110 at 0126, para. 14; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62–63.

2003 on government installations in Kutum and Tine;⁶⁷ (iii) on 25 April 2003 on the El Fasher airport;⁶⁸ (iv) in July 2003 on the police station in Bindisi;⁶⁹ (v) in August 2003 on a Central Reservists office in Mukjar⁷⁰ and on the military garrison in Arawala;⁷¹ and (vi) on 13 and 22 March 2004 on various official buildings, including the police station and prison in Buram.⁷

64. Furthermore, there are reasonable grounds to believe that, at the relevant time, the SLM/A and the JEM controlled certain areas of the territory in the Darfur region.⁷³
65. As a result, the Chamber concludes there are reasonable grounds to believe that, since at least March 2003, both the SLM/A and the JEM had, as required by article 8(2) (f) of the Statute, the ability to carry out sustained military operations for a prolonged period of time.
66. In the view of the Chamber, there are also reasonable grounds to believe that, as a result of the activities of the SLM/A and the JEM, the GoS issued a general call for the mobilisation of the Janjaweed Militia after the attack on the El Fasher airport in April 2003.⁷⁴

⁶⁷ Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0026, para. 065; Witness Statement (Anx 28) DAR-OTP-0097-0619 at 0625-0627, paras. 28–38; United Nations Economic and Social Council (hereinafter “ECOSOC”), *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 1 May 2004 (Anx 45) DAR-OTP-0115-0673 at 0686, para. 48; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0572-0577.

⁶⁸ Amnesty International Report, *Sudan Darfur- Too many people killed for no reason* (Anx 18) DAR-OTP- 00020-067 at 068, para. 3; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-00018- 010 at 026, para. 65; ECOSOC, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) at DAR-OTP-0115-0673 at 0686, para. 48; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0589-0595.

⁶⁹ Witness Statement (Anx 25) DAR-00095-049 at 075, 086, paras. 121, 175; Witness Statement (Anx 65) DAR- OTP-0119-0503 at 0514, 0526, paras. 46 and 106.

⁷⁰ Witness Statement (Anx 65) DAR-OTP-0119-0503 at 0517, para. 62; Witness Statement (Anx 25) DAR-OTP- 00095-049 at 075, 086, paras. 121 and 176; Witness Statement DAR-OTP-0119-0711 at 0721, para. 52.

⁷¹ Witness Statement (Anx 19) DAR-OTP-00088-129 at 134, para. 22; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0603-0605.

⁷² Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005. Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0593, para. 4, and at 0594, para. 3.

⁷³ ICC-02/05-01/07-1 para. 39, Report of the International Commission of Inquiry- on Darfur (Anx 17) DAR- 00018-040 at 041, para. 132.

⁷⁴ Unofficial version of the *Armed Forces Memorandum concerning the ICC’s Inquiries* (Anx 56) DAR-OTP- 0116-0721 at 0727-0729; Report of the International Commission of Inquiry on

67. The Chamber also finds that there are reasonable grounds to believe that, thereafter, GoS forces began implementing a GoS counter-insurgency campaign throughout the Darfur region against the SLM/A, the JEM and other armed groups opposing the GoS.⁷⁵
68. The Chamber further finds that there are reasonable grounds to believe that the SLM/A and the JEM entered into several agreements with the GoS, most notably (i) the Peace Agreement between the GoS and the SLM/A signed on 3 and 4 September 2003; (ii) the cease fire agreement signed on 8 April 2004 between the GoS and the SLM/A and the JEM; and (iii) the Darfur Peace Agreement between the GoS and the SLM/A and the JEM signed on 5 May 2006.⁷⁶
69. Nevertheless, in the view of the Chamber, there are reasonable grounds to believe that the said agreements have not been fully implemented, and that, in spite of them, the hostilities between the GoS on the one hand, and the SLM/A, the JEM and other opposition armed groups has continued in the Darfur region.⁷⁷
70. In conclusion, the Chamber finds that there are reasonable grounds to believe that from March 2003 to at least 14 July 2008, a protracted armed conflict not of an international character, within the meaning of article 8(2)(f) of the Statute, existed in Darfur between the GoS and several organised armed groups, in particular the SLM/A and the JEM.

Darfur (Anx 17) DAR-OTP- 0018-0010 at 027 paras. 67-69; International Mission of Inquiry on Darfur, Mission to West Darfur, 11- 17 November 2004, Compiled notes of meetings and interviews (Anx 16) DAR-00016-139 at 159, Witness Statement (Anx 26) at DAR-OTP-0095-0151 at 0168 paras. 82-86; Witness Statement (Anx 28) DAR-OTP- 0097-0619 at 0624, para. 21; ECOSOC, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) DAR-OTP-0115-0673 at 0686, para. 48; Pruiner, G, *Darfur the ambiguous genocide* (Anx 74) at DAR-OTP-0120-0263 at 0304.

⁷⁵United Nations Human Rights Council, *Report on Human Rights Situations that Require the Council's Attention*, 28 November 2007 (A/HRC/6/19) (Anx 78) DAR-OTP-0138-0117, at 0124, para. 19; UN Press Release on Humanitarian Situation in Darfur, *Humanitarian situation in Darfur, Sudan, said to be among worst in world*, 8 December 2003 (Anx 79) DAR-OTP-0141-0159; HRW Report, *Darfur in Flames Atrocities in Western Sudan*, April 2006 (Anx 10) DAR-OTP-0003-0185, pp. 12-15 and 22-24; Amnesty International Report, *Darfur "Too many people killed for no reason,"* 3 February 2004 (Anx 18) DAR-OTP-0020-0067, pp. 9-10; Witness Statement (Anx 59) DAR-OTP-0018-0002 at 0019-0022, paras. 75-88, 93-94, 95-101; Transcript of interview (Anx 70) DAR-OTP-0120-0186.

⁷⁶African Union, Agreement with the Sudanese Parties on modalities for the establishment of a ceasefire commission (Anx 12) DAR-OTP-00005-308; Peace Agreement between the Government of the Republic of Sudan and the Sudanese Liberation Army (Anx 50) DAR-OTP-0116-0433. The presence and representation of the SLM/A and the JEM at peace talks shows that the GoS considered them to be key actors in the Darfur conflict.

⁷⁷Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0027, paras. 70-72; Witness Statement (Anx 29) DAR-OTP-0097-0639 at 0651, paras. 55-56.

71. Furthermore, the Chamber also finds that there are reasonable grounds to believe that the specific unlawful attacks and acts of pillage alleged by the Prosecution in the Prosecution Application were allegedly committed in the context of and were associated with, the said armed conflict in the Darfur region,⁷⁸ insofar as:

The armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of the battle. Nonetheless, the armed conflict must play a substantial role in the perpetrator's decision, in his or her ability to commit the crime or in the manner in which the conduct was ultimately committed.⁷⁹

(b) Whether there are reasonable grounds to believe that the specific elements of at least one war crime within the jurisdiction of the Court have been met

72. The Prosecution submits that from March 2003 to 14 July 2008, Omar Al Bashir used the "apparatus" of the State of Sudan to direct hundreds of attacks against the Fur, Masalit and Zaghawa civilian population taking no direct part in hostilities (article 8(2)(e)(i) of the Statute)⁸⁰ including, *inter alia* in: (i) Kodoom on or about 15 August 2003 and again on or about 31 August 2003; (ii) Bindisi on or about 15 August 2003; (iii) Mukjar on or about 17 August 2003 and again on one occasion between August and September 2003; (iv) Arawala on or around 10 December 2003; (v) Shattaya town and its surrounding villages on 9 February 2004; (vi) Kailek on or around 9 March 2004; (vii) towns and villages in Buram locality between November 2005 and September 2006; (viii) Muhajeriya on or about 8 October 2007; (ix) Saraf Jidad on 7, 12 and 24 January 2008; (x) Silea on 8 February 2008; (xi) Sirba on 8 February 2008; (xii) Abu Suruj on 8 February 2008; (xiii) civilian centres in Jebel Moon between 18 and 22 February 2008; and (xiv) Shegeg Karo on 5 May 2008.⁸¹
73. The Prosecution also alleges that GoS forces carried out acts of pillage (article 8(2)(e)(v) of the Statute) upon the seizure of those towns and villages in Darfur primarily inhabited by members of Fur, Masalit and Zaghawa groups, including, but not limited to, those mentioned in the previous paragraph.⁸²
74. The Chamber has already found that there are reasonable grounds to believe that, in response to the activities of the SLM/A, the JEM and other opposition armed groups in Darfur, soon after the attack on El Fasher airport in April 2003, the GoS issued a general call for the mobilisation of the Janjaweed

⁷⁸ ICC-02/05-01/07-1, para. 47; *The Prosecution Application*, para. 240; African Union, Agreement with the Sudanese Parties on modalities for the establishment of a ceasefire commission (Anx 12) at DAR-00005-308; Peace Agreement between the Government of the Republic of Sudan and the Sudanese Liberation Army (Anx 50) DAR-OTP-0116-0433.

⁷⁹ ICC-01/04-01/06-803-CEN, para. 287.

⁸⁰ *The Prosecution Application*, paras. 237, 269, 288–290 and 305–310.

⁸¹ *The Prosecution Application*, paras. 107, 202 and 213–233.

⁸² *The Prosecution Application*, paras. 213, 221, 223, 225 and 229.

Militia, and thereafter conducted, through GoS forces a counter-insurgency campaign throughout the Darfur region against the said groups.⁸³

75. The Chamber also finds that there are reasonable grounds to believe that such counter-insurgency campaign continued until the date of filing of the Prosecution Application on 14 July 2008 and was not confined to targeting (i) members of the SLM/A, the JEM and other armed groups involved in the ongoing armed conflict in Darfur; and (ii) individuals who were taking direct part in hostilities as a result of the support and assistance they were providing to the said groups.
76. In this regard, the Chamber is of the view that there are reasonable grounds to believe that a core component of the GoS counter-insurgency campaign, which was underway for well over five years, was the unlawful attack on that part of the civilian population of Darfur—belonging largely to the Fur, Masalit and Zaghawa groups⁸⁴—perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur.⁸⁵

⁸³ Witness Statement (Aux 31) DAR-OTP-0100-0075 at 0087-0088; Witness Statement (Aux J81) DAR-OTP- 0133-0573 at 0583, para. 36; Witness Statement (Aux J92) DAR-OTP-0128-0002 at 0010, para. 33.

⁸⁴ See Partly Dissenting Opinion of Judge Anita Uäacka, Part III. B.

⁸⁵ In relation to the first attack on Kodoom on or about 15 August 2003, see HRW Report *Targeting the Fur' Mass Killings in Darfur*, 21 January 2005 (Aux 22) DAR-OTP-00090-173 at 181-182; Witness Statement (Aux J70) DAR-OTP-00094-119 at 133-134, paras. 60-66. In relation to the second attack on Kodoom on or about 31 August 2003, see Witness Statement (Aux J70) DAR-OTP-00094-119 at 138-141, paras. 81-96. In relation to the attack on Bindisi on or about 15 August 2003, see Witness Statement (Aux 20) DAR-OTP-00088-187 at 192-195, paras. 23-36; Witness Statement (Aux 21) DAR-OTP-00088-219 at 227-229, paras. 49-61; Witness Statement (Aux J45) DAR-OTP-00088-060 at 065-068, paras. 19-31; and Witness Statement (Aux J70) DAR-OTP-00094-119 at 135, para. 71. In relation to the aerial attack on Mukjar between August and September 2003, see Witness Statement (Aux 21) DAR-OTP-00088-219 at 233-234, paras. 85-86. In relation to the attack on Arawala on or around 10 December 2003, see Witness Statement (Aux 19) DAR-OTP-00088-129 at 135-136, paras. 26-30; Witness Statement (Aux 43) DAR-OTP-0112-0175 at 0192 and 0193, paras. 73-74, 77-79; and Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Aux 52) DAR-OTP-0116-0568, at 064-065. In relation to the attack on Shattaya town and its surrounding villages (including Kailek) in February/March 2004, see Report of the International Commission of Inquiry on Darfur (Aux 17) DAR-OTP-00018-010 at 078, paras. 273-274; Witness Statement (Aux 66) DAR-OTP-0119-0711 at 0718, paras. 34-37; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Aux 52) DAR-OTP-0116-0568, at 0597, para. 6 and at 0598 para. 3; Commission's meeting with key personalities from the Kutum area, 8 July 2004 (Aux 63) DAR-OTP-0119-0402 at 0407. In relation to the attack on Muhajeriya on or about 8 October 2007, see United Nations Human Rights Council, *Report on Human Rights Situations that Require the Council's Attention*, 28 November 2007 (A/HRC/6/19) (Aux 78) DAR-OTP-0138-0116 at 0145-0146, para. (xvii). In relation to the attacks on Saraf Jidad on 7, 12 and 24 January 2008, see Ninth periodic report of the United Nations High Commissioner for Human Rights in the Sudan on the situation of human rights in the Sudan, *Attacks on civilians in Saraf Jidad*

77. Furthermore, the Chamber finds that there are reasonable grounds to believe that, as part of the above-mentioned GoS counter-insurgency campaign/GoS forces systematically committed acts of pillaging after the seizure of those towns and villages that were subject to their attacks.⁸⁶
78. Hence, the Chamber concludes that there are reasonable grounds to believe that, since the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport until 14 July 2008, war crimes within the meaning of articles 8(2)(e)(i) and 8(2)(e)(v) of the Statute were committed by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAG, as part of the said GoS counterinsurgency campaign.

Sirba, Silea and Abu Suruj in Januaray and February 2008, March 2008 (hereinafter the “Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) at DAR-OTP-0136-0369 at 0373. In relation to the attack to Jebel Moon between 18 and 22 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0283 and 0297-0300; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0375.

⁸⁶ Commission of Inquiry on Darfur (Anx 17) at DAR-OTP-00018-010 at 065-066; In relation to the first attack on Bindisi on or about 15 August 2003, see Witness Statement (Anx 20) at DAR-OTP-00088-187 at 193, para. 29; Witness Statement (Anx 21) DAR-OTP-00088-187 at 228, para. 53; and at DAR-OTP-00090-173 at 181–182; Witness Statement (Anx 41) DAR-OTP-0110-0054 at 0062; HRW report, *Targeting the Fur Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 180–182; Witness Statement (Anx J70) DAR-OTP-00094-119 at 135, para. 71. In relation to the attack on Arawala on or around 10 December 2003, see Witness Statement (Anx 19) DAR-OTP-00088-129 at 136–138, paras. 30, 36 and 41–42: Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604, paras. 2 and 3b. In relation to the attack on Muhajeriya on or about 8 October 2007, see Human Rights Council, Situations that require the Council’s attention (Anx 78) DAR-OTP-0138-0116 at 0145-0146, para (xvii). In relation to the attacks on Saraf Jidad on 7, 12 and 24 January 2008, see Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Aux 52) DAR-OTP-0116-0568 at 0602, para. 3, and at 0603, para. 1; Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0373. In relation to attack on Silea on 8 February 2008, see Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568, at 0602, para. 3, and at 0603, para. 1; HRW report, *They shot at us as we fled* (Anx 80) DAR-OTP-0143-0273 at 0283, 0294-0296; and Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0371, 0374-0375. In relation to the attack on Sirba on 8 February 2008, see HRW report, *They shot at us as we fled* (Anx 80) at DAR-OTP-0143-0273 at 0283, 0292-0294; and Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) at DAR-OTP-0136-0369 at 0374. In relation to the attack on Abu Suruj on 8 February 2008, see HRW report, *They shot at us as we fled* (Anx. 80) DAR-OTP-0143-0273 at 0283, 0290-0292; Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) at DAR-OTP-0136-0369 at 0373. In relation to the attack on Mukjar on 3 August 2003, see Witness Statement (Anx 24) DAR-OTP-00094-423 at 432; HRW report, *Targeting the Fur Mass Killings in Darfur*. 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 180–182.

2. Crimes against humanity

(a) *Whether there are reasonable grounds to believe that the contextual elements of at least one crime against humanity within the jurisdiction of the Court have been met*

79. The Prosecution submits that, from March 2003 to 14 July 2008, Omar Al Bashir used the “apparatus” of the State of Sudan to implement a policy of attacking the Fur, Masalit and Zaghawa civilian population of Darfur including, *inter alia*, in: (i) the towns of Kodoom, Bindisi, Mukjar and Arawala, and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur in August/September and December 2003; (ii) the towns of Shattaya and Kaile in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; (vi) Shegeg Karo and al-Ain areas in North Darfur in May 2008.⁸⁷
80. The Chamber observes that article 7(1) of the Statute defines crimes against humanity as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”
81. Although the terms “widespread” and “systematic” are not specifically defined in the Statute,⁸⁸ the Chamber has previously held that this language excludes random or isolated acts of violence, and that the term “widespread” refers to the large-scale nature of the attack, as well as to the number of victims, while the term “systematic” pertains to the organised nature of the acts of violence and to the improbability of their random occurrence.⁸⁹
82. Furthermore, the Chamber notes that article 7(2)(a) of the Statute provides the following definition of the term “attack directed against any civilian population”:

[. . .] a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.⁹⁰

⁸⁷ *The Prosecution Application*, paras. 214–217, 199–200, 222, 225, 228–229 and 233.

⁸⁸ Lee. R. S. (Ed.). *The International Criminal Court. Elements of Crimes and Rules of Evidence*. New York, Transnational Publishers, 2001, p. 78: “agreement was quickly reached among most delegations that such issues should not be addressed in the Elements and should be left to evolving jurisprudence.”

⁸⁹ ICC-01/04-01/07-717, paras. 394–397; ICC-02/05-01/07-I-Corr, para. 62, quoted in ICC-01/04-01/07-4, para. 33. Cited jurisprudence: ICTY, *The Prosecutor v Kordić and Đerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 94; *The Prosecutor v. Blagojević and Jokić*. Case No. IT-02-60-T. Trial Judgment, 17 January 2005, paras. 545–546.

⁹⁰ See METTRAUX, G., *International Crimes and the ad hoc Tribunals*, Oxford, Oxford University Press, 2005, p. 156.

83. As found in the previous section, the Chamber considers that there are reasonable grounds to believe that a core component of the GoS counter-insurgency campaign, and consequently a GoS policy, was the unlawful attack on that part of the civilian population of Darfur—belonging largely to the Fur, Masalit and Zaghawa groups⁹¹—perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur.⁹²
84. The Chamber also considers that there are reasonable grounds to believe that the above-mentioned attack on the said part of the civilian population of Darfur was large in scale, as it affected hundreds of thousands of individuals⁹³ and took place across large swathes of the territory of the Darfur region.⁹⁴
85. Furthermore, the Chamber finds that there are also reasonable grounds to believe that the above-mentioned attack was systematic as it lasted for well over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern. For instance, attacks on towns and villages inhabited mainly by members of the Fur, Masalit and Zaghawa groups are consistently described in the materials provided by the Prosecution as coordinated ground attacks in which the attackers had previously encircled the targeted village or came to such village with tens or hundreds of vehicles and camels, forming a sort of wide line.⁹⁵ Moreover, such materials also refer to the fact that such ground attacks were often preceded by aerial bombings by planes bearing the markings or indications of the State of Sudan,⁹⁶ and that

⁹¹ See Partly Dissenting Opinion of Judge Anita Ušacka, Part III. B.

⁹² Witness Statement (Anx 28) DAR-OTP-0097-0619 at 0624, para. 21; Witness Statement (Anx 33) DAR-OTP-0107-0313 at 0331, para. 73; Witness Statement (Anx 41) DAR-OTP-0024-0200 at 0067, para. 52; Witness Statement (Anx J45) DAR-OTP-0088-0060 at 071–072, para. 45; Witness Statement (Anx 42) DAR-OTP-0112-0142 at 0151, para. 45; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 77) DAR-OTP-0143-0273 at 0017, para. 52; Report of the International Commission of Inquiry on Darfur, (Anx 17) DAR-OTP-0018-0010 at 084,086, paras. 304 and 315.

⁹³ *The Prosecution Application*, para. 213; Witness Statement (Anx J45) DAR-OTP-0088-0060 at 065–066, paras. 19–24; Witness Statement (Anx J70) DAR-OTP-0094-0119 at 135–136, paras. 69–75; Witness Statement (Anx 19) DAR-OTP-0088-0129 at 135–136, paras. 26–28; Amnesty International Report, *Darfur. Too Many People Killed for No Reason* (Anx J5) at DAR-OTP-0002-0207 at 0209–0211; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369; International Crisis Group Report, *Darfur Deadline: A new International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055.

⁹⁴ ICC-02/05-151-US-Exp-AnxI; Office of UN Resident and Humanitarian Coordinator for the Sudan report (Anx J69) at DAR-OTP-0149-0537, HRW Report, *Sudan Darfur in Flames-Atrocities in Western Sudan*, April 2004 (Anx 10) at DAR-OTP-0003-0185; International Crisis Group Report, *Darfur Deadline. A new International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055.

⁹⁵ *The Prosecution Application*, paras. 106 and 361; Report of the International Commission of Inquiry on Darfur (Anx 17) at DAR-OTP-0018-0010 at 0057, para. 186.

⁹⁶ Witness Statement (Anx J45) DAR-OTP-0088-0060 at 065–066, paras. 19–24; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, para. 34; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan, (Anx J76) DAR-OTP-0136-0369 at 0373 and 0375.

Janjaweed Militia arrived on horse or camel-back along with, or shortly followed by, members of the Sudanese Armed Forces in motor vehicles.⁹⁷

86. Finally, the Chamber is mindful that, in order to constitute a crime against humanity, article 7(1) of the Statute also requires that the relevant acts of violence be committed with “knowledge of the attack” such that the perpetrator “knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.”⁹⁸
87. As the Chamber has already held, such knowledge should “not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”⁹⁹ On the contrary, this Chamber has previously understood this phrase to mean that the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack.¹⁰⁰
88. In the present case, the Chamber considers that there are reasonable grounds to believe that such a requirement is met as: (i) the attack against the above-mentioned part of the civilian population of Darfur affected at least hundreds of thousands of individuals during a period of more than five years; and (ii) numerous United Nations reports,¹⁰¹ several Security Council resolutions¹⁰² and the Report of the United Nations Commission of Inquiry,¹⁰³ which referred to the existence of a widespread and systematic attack by GoS forces on the above-mentioned part of the civilian population in Darfur, were released during the relevant time period and were widely publicised.

⁹⁷ Witness Statement (Anx J70) DAR-OTP-0094-0119 at 0133-0134, paras. 60–64; Witness Statement (Anx J45) DAR-OTP-0088-0060 at 065-066, paras. 19–24; Witness Statement (Anx 19) DAR-OTP-0088-0129 at 0136, paras. 27–28; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, para. 34; Ninth periodic report of the United Nations High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0373; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0291 and 0292-0294.

⁹⁸ Elements of Crimes, paragraph 2 of the Introduction to article 7 of the Elements of Crimes.

⁹⁹ Elements of Crimes, paragraph 2 of the Introduction to article 7 of the Elements of Crimes.

¹⁰⁰ ICC-01/04-01/07-717, para. 401. See also ICTY, *The Prosecutor v Kordić and Đerke*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 99; ICTY, *The Prosecutor v Blaškić*, Case No. IT-95-14-A, Appeals Judgment, 29 July 2004, para. 124; ICTR, *The Prosecutor v Semarica*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 332.

¹⁰¹ ECOSOC, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 1 May 2004 (Anx 45) DAR-OTP-0115-0673 at 0694-0695, paras. 92–96.

¹⁰² United Nations Security Council Resolution 1547, S/RES/1547 (2004); United Nations Security Council Resolution 1556, S/RES/1556 (2004); United Nations Security Council Resolution S/RES/1564 (2004); United Nations Security Council Resolution 1574, S/RES/1574 (2004); United Nations Security Council Resolution 1590, S/RES/1590 (2005).

¹⁰³ Report of the International Commission of Inquiry on Darfur, DAR-OTP-0018-0010 (Anx 17) at 0161-0163, paras. 630–638.

89. The Chamber thus concludes that there are reasonable grounds to believe that the contextual elements referred to in article 7(1) of the Statute have been met.

(b) Whether there are reasonable grounds to believe that the specific elements of at least one crime against humanity within the jurisdiction of the Court have been met

90. The Prosecution submits that, since March 2003 to 14 July 2008, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, killed thousands of individuals from the Fur, Masalit and Zaghawa groups, throughout the Darfur region, including, *inter alia*, in: (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur in August/September and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.¹⁰⁴
91. Moreover, the Prosecution submits that GoS forces systematically destroyed the means of survival—including food, shelter, crops, livestock and, in particular, wells and water pumps—of the Fur, Masalit and Zaghawa civilian population in Darfur because “[t]he aim was to ensure that those inhabitants not killed outright would be unable to survive without assistance.”¹⁰⁵ In this regard, the Prosecution submits that:

Given Darfur’s hostile desert environment and lack of infrastructure, livelihood strategies historically have centred on the village. It is difficult to survive outside the communal setting. As an example, ensuring adequate access to water has long been an essential component of livelihood strategies. To facilitate access to water by both humans and animals, many villagers dug communal wells or maintained other communal water sources. Militia/Janjaweed and the Armed Forces repeatedly destroyed, polluted or poisoned these wells so as to deprive the villagers of water needed for survival. In a number of cases, water installations were bombed.¹⁰⁶

92. The Chamber observes that, as there was an ongoing armed conflict at the relevant time, the killing of the following two categories of individuals, without violating international humanitarian law, cannot be considered unlawful,

¹⁰⁴ *The Prosecution Application*, paras. 62 (Count 1, 3, 4, 5), 371–372), 199, 214–217, 223, 226 and 232–233.

¹⁰⁵ *The Prosecution Application*, para. 175.

¹⁰⁶ *The Prosecution Application*, paras. 175 and 176.

and therefore cannot be taken into consideration in assessing the Prosecution's allegations for crimes against humanity:

- (i). those members of the SLM/A, the JEM or any other armed group opposing the GoS in the ongoing armed conflict in Darfur; and
- (ii). those other individuals who, despite not being members of the said armed groups, were assisting any of them in such a way as to amount to taking direct part in the hostilities.

93. Moreover, the Majority considers that, although there are reasonable grounds to believe that GoS forces at times contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked,¹⁰⁷ there are no reasonable grounds to believe that such a contamination was a core feature of their attacks.¹⁰⁸
94. Nevertheless, in light of the materials provided by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of murder by GoS forces, between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.¹⁰⁹

¹⁰⁷ One source mentions three incidents of destruction of water sources see Physicians for Human Rights, Report *Darfur Assault on Survival, A call for Security, Justice, and Restitution* (Anx 344) DAR-OTP-0119-0635 at 0679 and see *The Prosecution Application* at paras. 174–176. However, neither of the UN High Commissioner for Human Rights reports on attacks by government forces in the Sudan make reference to the destruction of water sources—see Third Periodic report (Anx J75) at DAR-OTP-0108-0563, Ninth Periodic report (Anx J76) DAR-OTP-0136-0369. Indeed the Prosecution implies that many towns were sufficiently habitable for the land to be usurped by other tribes, see *The Prosecution Application*, paras. 179–184.

¹⁰⁸ United Nations High Commissioner for Human Rights Third Periodic report on the human rights situation in the Sudan (Anx J75) DAR-OTP-0108-0563 at 0572, para. 34.

¹⁰⁹ In relation to the first attack on Kodoom on or about 15 August 2003, see HRW Report, *Targeting the Fur: Mass Killings in Darfur* 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 182; Witness Statement (Anx J70) DAR-OTP-00094-119 at 133–134, para. 66. In relation to the second attack on Kodoom on or about 31 August 2003, see and HRW Report, *Targeting the Fur Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 182; In relation to the attack on Bindisi on or about 15 August 2003, see Witness Statement (Anx 20) DAR-OTP-00088-187 at 192–194, paras. 23–27 and 32; Witness Statement (Anx 21) DAR-OTP-00088-219 at 227–228, paras. 47–49 and 32; Witness Statement (Anx J45) DAR-OTP-00088-060 at 065–066, paras. 20–23; Witness Statement (Anx 65) DAR-OTP-0119-0503 at 0521, 0522, paras. 81 and 85; and Witness Statement (Anx J70) at DAR-OTP-00094-119 at 135, para. 72. In relation to the aerial attack on Mukjar between August and September 2003, see Witness Statement (Anx 21) DAR-OTP-00088-219 at 233–234, paras. 85–86. In relation to the attack on Arawala on or around 10 December 2003, see Witness Statement (Anx 19) DAR-OTP-0088-0129 at 0136, paras. 27–28; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed. Volume 2 (Anx 52) DAR-OTP-0116-0568, at 0605. In relation to the attack on Shattaya town and its surrounding villages (including Kailek) in February/March 2004, see Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-00018-010 at 078, paras. 273–274; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, paras. 34–37. In relation to attacks

95. The Prosecution alleges that the materials submitted in support of the Prosecution Application in relation to the crime against humanity of murder, also provide reasonable grounds to believe that acts of extermination were committed, during the relevant period in the Darfur region, by GoS forces, against civilians from the Fur, Masalit and Zaghawa groups.¹¹⁰
96. In this regard, the Chamber highlights that, according to the Elements of Crimes, the crime of extermination requires that the relevant killings constitute or take place as part of “a mass killing of members of a civilian population.” The Chamber observes that this has also been the interpretation adopted by the case law of the ICTY¹¹¹ and the ICTR.¹¹²
97. In this regard, and based on a review of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber is of the view that there are reasonable grounds to believe that acts of extermination, such as the alleged killing of over a thousand civilians in connection with the attack on

in Buram locality between November 2005 and September 2006, see Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 32 and 35–37. In relation to the attack on Muhajeriya on or about 8 October 2007, see United Nation Human Rights Council, *Report on Human Rights Situations that require the Council's attention* (A/HRC/6/19) (Anx 78) DAR-OTP-0138-0116 at 0145-0146, para (xvii). In relation to the attacks on Saraf Jidad on 7, 12 and 24 January 2008, see Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0373. In relation to attack on Silea on 8 February 2008, see HRW Report, *They shot at us as -we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0294-0295; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374-0375. In relation to the attack on Sirba on 8 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0292-0293; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374. In relation to the attack on Abu Suruj on 8 February 2008, see HRW Report, “*They shot at us as we fled*,” 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0290-0291; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0373. In relation to the attack to Jebel Moon between 18 and 22 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0297-0299; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0375. In relation to the attack on Shegeg Karo and al-Ain in May 2008, see Press Article, The Nation, *Death in Darfur*, 6 May 2008 (Anx 4, line 168) DAR-OTP-0149-0383 and Press Article, Sudan Tribune, *School Bombed in North Darfur, six children killed*, 9 May 2008 (Anx 4, line 168) DAR-OTP-0149-0387. See also UN News Service, *At five-year mark, Darfur crisis in only worsening—UN aid Chief*, 22 April 2008 (Anx J27) DAR-OTP-0147-1068.

¹¹⁰ *The Prosecution Application*, para. 235.

¹¹¹ ICTY, *The Prosecutor v Jokic*, Case No. IT-02-60-T, Trial Judgement, 17 January 2005, paras. 571 and 573; ICTY, *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 August 2001, paras. 497, 501 and 502; ICTY *Prosecutor v Vasiljević*, Case No. IT-98-32-T, Trial Judgement, 29 November 2002, paras. 219–220, 222 and 227.

¹¹² ICTR, *The Prosecutor v Karera*, Case No. ICTR-01-74-T, Trial Judgement, 7 December 2007, paras. 551 and 552; ICTR, *The Prosecutor v Simba*, Case No. ICTR-2001-76-T, Trial Judgement, 13 December 2005, para. 422.

the town of Kailek on or around 9 March 2004, were committed by GoS forces against civilians primarily from the Fur, Masalit and Zaghawa groups, in the Darfur region, during the relevant period.¹¹³

98. The Prosecution further submits that, from March 2003 to 14 July 2008, GoS forces forcibly transferred up to 2.7 million civilians from the Fur, Masalit and Zaghawa groups residing throughout the Darfur region,¹¹⁴ including, *inter alia*, from: (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur, between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur, between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur, between January and February 2008.¹¹⁵
99. Moreover, the Prosecution submits that the forcible transfer of a substantial part of the Fur, Masalit and Zaghawa civilian population was accompanied by the subsequent usurpation of their land by members of those tribes that were allied to the GoS. According to the Prosecution:

Usurpation of the land is often the final blow to the capacity of the target groups to survive in Darfur. Land has always been identified as a key issue, by AL BASHIR himself. In his April 2003 address to the Armed Forces and PDF troops at Al Fashir airport, AL BASHIR declared that "I only want land." [. . .] Having removed the target groups from their land, and destroyed their means of survival, the GoS encouraged and facilitated resettlement of the land by other ethnic groups.¹¹⁶

100. Based on an analysis of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of forcible transfer by GoS forces between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.¹¹⁷

¹¹³ Witness Statement, (Anx 66) DAR-OTP-0119-0711 at 0718-0719, paras. 34–37 (describing how the witness was given a list of 1700 persons killed, or presumed dead, in an attack on Kailek); Witness Statement (Aux J8) DAR-OTP-0150-0255 at 0263 (saying the dead, missing or captured during the Kailek attacks numbered 1350); Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0078, paras. 273 and 274 (the commission stated it confirmed 'mass killings of civilians' in Kailek).

¹¹⁴ *The Prosecution Application*, para. 157.

¹¹⁵ *The Prosecution Application*, paras. 199, 221, 224, 227–228, 232.

¹¹⁶ *The Prosecution Application*, paras. 179–180.

¹¹⁷ UN Security Council Press release, 22 April 2008 (Anx J38) DAR-OTP-0147-0859 at 0860; UN Security Council 5872nd meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061; UNCOI Material, (Anx J72) DAR-OTP-0038-0060 at 0065; Commission of Inquiry into alle

101. Furthermore, the Chamber also considers that there are reasonable grounds to believe that, at times, GoS forces encouraged members of other tribes, which were allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups.¹¹⁸
102. The Prosecution further alleges that, from March 2003 to 14 July 2008, GoS forces tortured numerous civilians from the Fur, Masalit and Zaghawa groups in the Darfur region,¹¹⁹ including, *inter alia*, in: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality, West Darfur in February 2008.¹²⁰
103. The Majority observes that the Prosecution's allegations in relation to torture refer, for the most part, to acts of torture allegedly committed during, or in the immediate aftermath of the attacks conducted by GoS forces against towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups.¹²¹ The Majority also notes that the Prosecution makes no allegations concerning the existence of reasonable grounds to believe that GoS forces established in Darfur long-lasting detention camps where inmates were systematically mistreated and tortured.
104. Based on an analysis of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject to acts of torture by GoS forces in the Darfur region between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.¹²²

gations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604; United Nations Inter-agency Report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0067; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 35, 39, 44; United Nations Human Rights Council, *Report on Human Rights Situations that require the Council's attention* (A/HRC/6/19) (Anx 78) at DAR-OTP-013 8-0116 at 0145-0146; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0300, 0291-0296; Ninth periodic report of the United Nations High Commissioner for Human Rights. Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0374.

¹¹⁸ Witness Statement (Anx J47) DAR-OTP-0125-0665 at 0716, para. 255.

¹¹⁹ *The Prosecution Application*, paras. 119, 120, 146–147, 220 and 237.

¹²⁰ *The Prosecution Application*, paras. 200–201, 220, 228 and 232.

¹²¹ *The Prosecution Application*, paras. 146, 151–154, 220 and 232(c).

¹²² HRW Report, *They Shot at Us as We Fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0290-0300; Witness Statement (Anx 24) DAR-OTP-0094-0423 at 0434, para. 46; Witness Statement (Anx J62) DAR-OTP-0012-0105 at 0105, para. 10; Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan, 27 January 2006 (Anx J35) DAR-OTP-0136-0263 at 0282 and 0283; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, para. 36; UN General Assembly. Human Rights Council, *Human Rights Situations that Require the Council's Attention* (A/HRC/7/22). 3 March 2008 (Anx J28) DAR-OTP-0148-0259 at 0269-0270, paras. 45 and 46.

105. Finally, the Prosecution alleges that from March 2003 to 14 July 2008, GoS forces raped thousands of women from the Fur, Masalit and Zaghawa groups throughout the Darfur region,¹²³ including, *inter alia*, in: (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.¹²⁴
106. In particular, the Prosecution submits that:

Witnesses interviewed by the Prosecution, the UNCOI, other UN bodies and numerous NGOs have reported that, since March 2003, thousands of women and girls belonging to the target groups were raped in all three States of Darfur by members of the Armed Forces and Militia/fanjaweed. Girls as young as five and women as old as 70 have been raped. Gang rape—the rape of one or more victims by more than one perpetrator—has been a distinctive feature of sexual violence in Darfur [. . .] Rape has been used as a weapon during the attacks on villages and has been “*a critical element in the sweeping, scorched-earth campaign by the Janjaweed and the GoS against the non-Arab Darfurians.*” Rape has also been a characteristic of the abuses in and around the camps for the internally displaced persons. Most of these rapes have been attributed by victims to members of the Armed Forces, Militia/Janjaweed and other GoS agents.¹²⁵

107. Moreover, the Chamber observes that, according to the Prosecution’s allegations, most instances of rape took place when civilian women left the IDP Camps, as opposed to when GoS forces (i) seized those towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups; or (ii) entered IDP Camps within Darfur.¹²⁶
108. Based on an analysis of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of rape by GoS forces between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.¹²⁷

¹²³ *The Prosecution Application*, p. 22, Count 8 and paras. 120–137, 201, 213, 218–219 and 237.

¹²⁴ *The Prosecution Application*, paras. 201–202, 218–219 and 232.

¹²⁵ *The Prosecution Application*, paras. 121 and 122.

¹²⁶ *The Prosecution Application*, paras. 124–125, 132, 137 and 143–144.

¹²⁷ UN General Assembly, Human Rights Council, *Human Rights Situations that Require the Council’s Attention* (A/HRC/7/22), 3 March 2008 (Anx J28) at DAR-OTP-0148-0259 at 0270, para. 47; Witness Statement, (Anx 20) DAR-OTP-0088- 0187 at 0196, para. 41; Witness Statement, (Anx 21) DAR-OTP-0088-0219 at 0230, para. 67; Witness Statement (Anx J15), DAR-OTP-0088-0306 at 0325, para. 146; Witness Statement, (Anx 66) DAR-OTP-0119-0711 at 0718, para. 36; see Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374-0375; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0296; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, para. 44.

109. The Chamber is therefore satisfied that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport to 14 July 2008, the GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, committed crimes against humanity of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(l)(a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region, pursuant to the GoS policy to unlawfully attack, as a core component of its counter-insurgency campaign, that part of the civilian population of Darfur—belonging to a large extent to the Fur, Masalit and Zaghawa groups¹²⁸—perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur.

3. *Genocide*¹²⁹

(a) *Introduction*

1. Prosecution allegations

110. The Prosecution submits that there are reasonable grounds to believe that Omar Al Bashir bears criminal responsibility under article 25(3)(a) of the Statute for the crime of genocide as a result of:

- i. the killing of members of the Fur, Masalit and Zaghawa ethnic groups (article 6(a)—Count 1);
- ii. causing serious bodily or mental harm to members of the Fur, Masalit and Zaghawa ethnic groups (article 6(b)—Count 2); and
- iii. deliberately inflicting on the Fur, Masalit and Zaghawa ethnic groups conditions of life calculated to bring about the groups physical destruction (article 6(c)—Count 3).¹³⁰

111. Nevertheless, the Prosecution acknowledges that (i) it does not have any direct evidence in relation to Omar Al Bashir's alleged responsibility for the crime of genocide;¹³¹ and that therefore (ii) its allegations concerning genocide are solely based on certain inferences that, according to the Prosecution, can be drawn from the facts of the case.¹³²

112. The Majority observes that the crime of genocide is defined in article 6 of the Statute as follows:

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

¹²⁸ See Partly Dissenting Opinion of Judge Anita Uäacka, Part III. B.

¹²⁹ Judge Anita Uäacka dissents from the findings of the Majority in relation to genocide. See Partly Dissenting Opinion of Judge Anita Uäacka, Part III.

¹³⁰ *The Prosecution Application*, pp. 20–21.

¹³¹ *The Prosecution Application*, paras. 371–373.

¹³² *The Prosecution Application*, para. 373.

- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.
113. The Majority also notes that the Elements elaborate on the definition of genocide provided for in article 6 of the Statute, establishing that the three following elements must always be fulfilled for the existence of the crime of genocide under the Statute:
- i. the victims must belong to the targeted group;
 - ii. the killings, the serious bodily harm, the serious mental harm, the conditions of life, the measures to prevent births or the forcible transfer of children must take place "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction"; and
 - iii. the perpetrator must act with the intent to destroy in whole or in part the targeted group.
114. The Majority highlights that the crime of genocide is characterised by the fact that it targets a specific national, ethnic, racial or religious group. In the view of the Majority, its purpose is to destroy in whole or in part the existence of a specific group or people, as opposed to those individuals who are members thereof.¹³³ In this regards, the Majority notes the explanation by Raphael Lemkin concerning the creation of the word "genocide" from the Greek *genos*, meaning race or tribe, and the Latin *caedere*, meaning to kill.¹³⁴
115. The Majority also observes that, in the present case, the Prosecution claims that three different groups have been targeted: the Fur, the Masalit and the Zaghawa. As the definition of the crime of genocide aims at protecting the existence of a specific group or people, the Majority is of the view that the Prosecution should have articulated the counts in a different manner according to the following structure:
- i. one count of genocide against the Fur ethnic group;
 - ii. one count of genocide against the Masalit ethnic group;
 - iii. one count of genocide against the Zaghawa ethnic group.¹³⁵

¹³³ See International Court of Justice ("the ICJ"), *Case concerning the Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment (No.91), 26 February 2007 [hereinafter 'ICJ Judgment on Genocide'], para.193.

¹³⁴ Lemkin, R., *Axis Rule in Occupied Europe, laws of occupation, analysis of government, proposals for redress*, Lawbook Exchange, 1944, p. 79.

¹³⁵ Each count of genocide would include those acts provided in article 6 of the Statute allegedly committed against the members of the relevant group (killing, causing serious bodily or mental harm and imposing conditions of life calculated to bring about the total or partial destruction of the Fur).

116. Nevertheless, as, for each of the three counts of genocide included in the Prosecution Application, the Prosecution makes a separate analysis of the alleged underlying facts in relation to each of the three targeted groups, the Majority is in a position to analyse the Prosecution's allegations concerning genocide.

2. Contextual elements of the crime of genocide

117. The Majority observes that the definition of the crime of genocide in article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 ("the 1948 Genocide Convention") does not expressly require any contextual element.¹³⁶

118. The Majority also notes that article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("the ICTY") and article 2 of the Statute of the International Criminal Tribunal for Rwanda ("the ICTR") have adopted the same definition of Genocide as the one provided for in article II of the 1948 Genocide Convention.

119. The Majority highlights that the case law of the ICTY and the ICTR has interpreted this definition as excluding any type of contextual element, such as a genocidal policy or plan.¹³⁷ Hence, for the case law of the ICTY and the ICTR, the crime of genocide is completed by, *inter alia*, killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs.¹³⁸ As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof.¹³⁹

¹³⁶ Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entered into force on 12 January 1951.

¹³⁷ ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 400; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, paras. 520 and 523. See also Cryer, R., Friman, H., Robinson, D. and Wilmschurst E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 168 and 177–178. See also Cassese, A., *International Criminal Law*, 2nd edition, New York, Oxford University Press, 2008, pp. 140–141.

¹³⁸ ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 521; ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 400 and ICTY, *The Prosecutor v. Blagojević and Jović*, Case No. IT-02-60, Trial Judgment, 17 January 2005, para. 645. See also Cryer, R., Friman, H., Robinson, D. and Wilmschurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, p. 168. See also Cassese, A., *International Criminal Law*, 2nd edition, New York, Oxford University Press, 2008, p. 134. See also Schabas, W.A., *Genocide in International Law The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, p. 112.

¹³⁹ ICTY, *The Prosecutor v. Krstić*, Case No. IT-98-33-A, Trial Judgment, 19 April 2004, para. 133; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 498 and ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 170. See also Cryer, R., Friman, H., Robinson, D. and Wilmschurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 182–185.

120. As a consequence, according to the case law of the ICTY and the ICTR, the protection offered to the targeted groups by the penal norm defining the crime of genocide is dependent on the existence of an intent to destroy, in whole or in part, the targeted group.¹⁴⁰ As soon as such intent exists and materialises in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group.¹⁴¹
121. The Majority observes that the definition of the crime of genocide provided for in article 6 of the Statute is the same as that included in article II of the 1948 Genocide Convention, and that the Elements of Crimes elaborate upon it by, *inter alia*, requiring a contextual element.¹⁴²
122. The Majority also notes that the Prosecution underlines the existence of this contextual element of the crime of genocide at paragraph 76 of the Prosecution Application.
123. The Majority further observes that, according to this contextual element provided for in the Elements of Crimes, the conduct for which the suspect is allegedly responsible, must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group.
124. In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words,

¹⁴⁰ For this reason, some commentators have qualified the crime of genocide as 'a crime of *mens rea*.' See Cassese, A. (Ed.) *The Rome Statute of the International Criminal Court a commentary*, Vol. 1, New York. Oxford University Press, 2002, p. 338. See also Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 182–185. See also Zahar, A. and Sluiter, G., *International Criminal Law*, New York, Oxford University Press, pp. 163 and 172–173. See also Schabas, W.A.. "Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia," *Westlaw* 25 FDMLJ 23, 2001, pp. 9–10.

¹⁴¹ Werle, G. *Principles of International Criminal Law*, The Netherlands. TMC Asser Press, 2005. p. 192, para. 565. See also Ambos K., "Current Issues in International Criminal Law" in *Criminal Law Forum*, vol. 14 no. 3, Kluwer Academic Publishers, 2003, 225–259.

¹⁴² Some authors have referred to this element as a jurisdictional element insofar as the Elements of Crimes of genocide do not expressly require that it be covered by the knowledge of the perpetrator. According to these authors, this marks a significant difference with the provision on crimes against humanity because, according to article 7(1) of the Statute, the perpetrator must be aware that his or her actions or omission are part of a widespread or systematic attack against a civilian population. See Werle, G. *Principles of International Criminal Law*, The Netherlands, TMC Asser Press, 2005, pp. 191–194. See also Ambos K., "Current issues in international criminal law" in *Criminal Law Forum*, 14, 225–260, Kluwer Academic Publishers, 2004, pp. 247–248. However, the Majority observes that, in the absence of an express subjective requirement in relation to the contextual element of genocide, the general subjective element provided for in article 30 of the Statute would be applicable. On the application of the general subjective element provided for in article 30 of the Statute, see ICC-01/04-01/07-717, paras. 226–228, 251, 271, 295, 315, 316, 331, 346, 359 and 372.

the protection offered by the penal norm defining the crime of genocide—as an *ultima ratio* mechanism to preserve the highest values of the international community—is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.

125. The Majority is aware that there is certain controversy as to whether this contextual element should be recognised.¹⁴³
126. In this regard, the Majority recalls that, according to article 21(1)(a) of the Statute, the Court must apply “in the first place” the Statute, the Elements of Crimes and the Rules. Moreover, as already held in the previous section on jurisdiction, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be applied when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria provided for in articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* and article 21(3) of the Statute.¹⁴⁴
127. It is in this scenario that, in the view of the Majority, article 10 of the Statute becomes meaningful insofar as it provides that the definition of the crimes in the Statute and the Elements of Crimes shall not be interpreted “as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”
128. As a result, the Majority considers that the Elements of Crimes and the Rules must be applied unless the competent Chamber finds an irreconcilable contradiction between these documents on the one hand, and the Statute on the other hand. If such irreconcilable contradiction is found, the provisions contained in the Statute must prevail.
129. In the Majority’s view, this interpretation is not inconsistent with a literal interpretation of article 9(1) of the Statute, which states that “elements of the crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8.”
130. Furthermore, it is supported by the contextual interpretation of article 9(1) of the Statute in light of article 21(1) of the Statute and by the existence of the same requirements for the amendment of the Elements of Crimes and the Rules.¹⁴⁵

¹⁴³ See Cryer, R., Friman, H., Robinson, D. and Wilmschurst, E., *An Introduction to International Criminal Law and Procedure*. United Kingdom, Cambridge University Press, 2007, pp. 177–179. See also Schabas, W.A., *Genocide in International Law. The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, pp. 245–248. See also Werle, G. *Principles of International Criminal Law*, The Netherlands, TMC Asser Press, 2005, pp. 191–194.

¹⁴⁴ ICC-01/04-01/07-717, para. 64; ICC-01/04-01/06-803-tEN, para. 69.

¹⁴⁵ According to articles 9(2) and 51(1), the amendments to the Elements of Crimes and to the Rules must be adopted by a two-thirds majority of the members of the Assembly of States Parties.

131. The Majority considers that this interpretation is also supported by the object and purpose of article 9(1) of the Statute, which consists of furthering the *nullum crimen sine lege* principle embraced in article 22 of the Statute, by providing *a priori* legal certainty on the content of the definition of the crimes provided for in the Statute.¹⁴⁶ In the Majority's view, had the application of the Elements of Crimes been fully discretionary for the competent Chamber, the safeguards provided for by the article 22 *nullum crimen sine lege* principle would be significantly eroded.
132. In the case at hand, the Majority does not observe any irreconcilable contradiction between the definition of the crime of genocide provided for in article 6 of the Statute and the contextual element provided for in the Elements of Crimes with regard to the crime of genocide.
133. Quite the contrary, the Majority considers that the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or a part thereof, is (i) not *per se* contrary to article 6 of the Statute; (ii) fully respects the requirements of article 22(2) of the Statute that the definition of the crimes "shall be strictly construed and shall not be extended by analogy" and "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted"; and (iii) is fully consistent with the traditional consideration of the crime of genocide as the "crime of the crimes."¹⁴⁷

3. Specific elements of the crime of genocide

134. The Majority observes that, in addition to the above-mentioned contextual element, the Elements of Crimes provide for the following two elements, which are common to the above-mentioned five categories of genocidal acts provided for in article 6 of the Statute: (i) the victims must belong to a particular national, ethnic, racial or religious group; and (ii) the perpetrator must act with the intent to destroy in whole or in part that particular group.
135. In relation to the first element, the Majority is of the view that the targeted group must have particular positive characteristics (national, ethnic, racial or religious), and not a lack thereof.¹⁴⁸ In this regard, it is important to

¹⁴⁶ See Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*. United Kingdom, Cambridge University Press, 2007, pp. 178–179. See also Schabas, W.A., *Genocide in International Law The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, pp. 110–111.

¹⁴⁷ Killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs can hardly be said to amount to 'the crime of the crimes'. See Schabas, W.A. *Genocide in International Law: The Crime of Crimes* (2nd ed), United Kingdom, Cambridge University Press, 2008, pp. 1, 11, 15, 269, 301, 652, 653, 654.

¹⁴⁸ ICJ Judgment on Genocide, paras. 191–194. ICTR, *The Prosecutor v Akayesu*, Case No. ICTR 96-4-T, Trial Judgment, 2 September 1998, paras. 510–516; ICTY, *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 551–561; ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 20–28.

highlight that the drafters of the 1948 Genocide Convention gave “close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics.”¹⁴⁹ It is, therefore, a matter of who the targeted people are, not who they are not.¹⁵⁰ As a result, the Majority considers that negative definitions of the targeted group do not suffice for the purpose of article 6 of the Statute.

136. The Majority considers that there are no reasonable grounds to believe that nationality, race and/or religion are a distinctive feature of any of the three different groups—the Fur, the Masalit and the Zaghawa—that, according to the Prosecution, have been targeted. In this regard, the Majority highlights that the members of these three groups, as well as others in the region, appear to have Sudanese nationality, similar racial features, and a shared Muslim religion.¹⁵¹
137. As a result, the question arises as to whether any of the three said groups is a distinct ethnic group. In this regard, the Majority finds that there are reasonable grounds to believe that this question must be answered in the affirmative as there are reasonable grounds to believe that each of the groups (the Fur, the Masalit and the Zaghawa) has its own language, its own tribal customs and its own traditional links to its lands.¹⁵²
138. In relation to the second element, the crime of genocide is characterised by the fact that any of the five categories of genocidal acts provided for in article 6 of the Statute must be carried out with the “intent to destroy, in whole or in part, a national, ethnic, racial or religious group.” In the view of the Majority, this introduces a subjective element that is additional to the general intent and knowledge requirement provided for in article 30 of the Statute.¹⁵³

¹⁴⁹ ICJ Judgment on Genocide, paras. 191–194. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.

¹⁵⁰ ICJ Judgment on Genocide, paras. 191–194. ICTR, *The Prosecutor v Akayesu*, Case No. ICTR 96-4-T, Trial Judgment, 2 September 1998, paras. 510–516; ICTY, *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment 2 August 2001, paras. 551–561; ICTY *The Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 20–28.

¹⁵¹ Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-00018-010 at paras. 41, 52–53 and 60.

¹⁵² Report of the International Commission of Inquiry on Darfur (Anx 17) at DAR-OTP-0018-0010 at 023, para. 52. The Majority notes that neither the Statute nor the rules provide for a definition of “ethnic group.” The Majority also observes that international case law has not provided either a clear definition of what an “ethnic group” is. In this regard, the Majority observes that the ICJ, in its recent Judgment on Genocide, did not rule on whether a wholly objective (based on anthropological considerations), a wholly subjective (based only upon the perception of the perpetrators), or a combined objective/subjective approach to the definition of the relevant group should be adopted (see ICJ Judgment on the Genocide, para. 191). However, the Majority considers that, for the purpose of the present decision, it is unnecessary to further explore this issue.

¹⁵³ The Chamber has defined this requirement in its 29 January 2006 Decision on the Confirmation of the Charges in the case of *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, paras. 351 et seq, and its 30 September 2008 Decision on the Confirmation of the Charges in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*,

139. As a result, the Majority considers that the crime of genocide is comprised of two subjective elements:
- i. a general subjective element that must cover any genocidal act provided for in article 6(a) to (e) of the Statute, and which consists of article 30 intent and knowledge requirement; and
 - ii. an additional subjective element, normally referred to as “*dolus specialis*” or specific intent, according to which any genocidal acts must be carried out with the “intent to destroy in whole or in part” the targeted group.¹⁵⁴

ICC-01/04-01/07-717, paras. 527 *et seq* In its recent Judgment on Genocide, the ICJ has defined the general subjective element that must cover the specific genocidal acts as follows: “It is well established that the acts—[here the ICJ enumerates the acts]—themselves include mental elements, “killings” must be intentional, as must “causing serious bodily or mental harm.” Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words “deliberately” and “intended,” quite apart from the implications of the words “inflicting” and “imposing”; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts.” (para. 186).

¹⁵⁴ ICJ Judgment on Genocide, para. 186. ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 66 and 79; ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeal Judgment, 5 July 2001. para. 45–46. ICTY, *The Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment. 2 August 2001. para. 550–552, 569, 571. A number of authors have put forward in the recent years an innovative approach to the subjective elements of the crime of genocide, known as ‘knowledge-based approach’ See also Kress, C., “*The Darfur Report and Genocidal Intent*,” J Int Criminal Justice, pp. 562–578, Oxford University Press, March 2005, see in particular pp. 565–572. See also Schabas, W.A., *Genocide in International Law The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, pp. 241–264. According to this approach, direct perpetrators and mid-level commanders can be held responsible as principals to the crime of genocide even if they act without the *dolus specialis*/specific intent to destroy in whole or in part the targeted group. According to these authors, as long as those senior political and/or military leaders who planned and set into motion a genocidal campaign act with the requisite *dolus specialis*/ulterior intent, those others below them, who pass on instructions and/or physically implement such a genocidal campaign, will commit genocide as long as they are aware that the ultimate purpose of such a campaign is to destroy in whole or in part the targeted group. The ‘knowledge-based approach’ does not differ from the traditional approach in relation to those senior political and/or military leaders who planned and set into motion a genocidal campaign: they must act with the intent to destroy in whole or in part the targeted group because, otherwise, it would not be possible to qualify a campaign of violence against the members of a given group as a genocidal campaign. Moreover, when, as in the present case, those who allegedly planned and set into motion a genocidal campaign are prosecuted pursuant to article 25(3)(a) of the Statute as indirect (co) perpetrators, the mental element of the direct perpetrators becomes irrelevant. As explained in the Decision on the Confirmation of the Charges in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, the reason being that, according to article 25(3) (a) of the Statute, such senior political and military leaders can be held liable as principals of the crime of genocide regardless of whether the persons through which the genocidal campaign is carried out are criminally liable (ICC-01/04-01/07-717, paras. 571–572. 573–576. 579–580). As a result, the “knowledge-based approach” would only differ from the traditional approach to the subjective elements of the crime of genocide in those cases in which mid-level superiors and low-level physical perpetrators are subject to prosecution before this Court. In this regard, the literal interpretation of the definition of the crime of genocide

140. The Majority observes that, in relation to the additional subjective element, the International Court of Justice (“the ICJ”) has recently held in its Judgment on Genocide that:

In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the “intent to destroy, in whole or in part . . . [the protected] group, as such.” It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis* in the present Judgment it will usually be referred to as the “specific intent (*dolus specialis*).” It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.¹⁵⁵

141. Given the factual allegations made by the Prosecution in the Prosecution Application, the Majority considers it to be of particular relevance for the purpose of the present case to distinguish between:

- i. the *dolus specialis/specific* intent required for the crime of genocide (genocidal intent consisting of the intent to destroy in whole or in part a national, ethnic, racial or religious group); and
- ii. the *dolus specialis/specific* intent required for the crime against humanity of persecution (persecutory intent consisting of the intent to discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, against the members of a group, by reason of the identity of the group).

142. The Majority observes that the ICJ has underlined the importance of this distinction in its recent Judgment on Genocide by stating that:

The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International

in article 6 of the Statute and in the Elements of Crimes makes clear that only those who act with the requisite genocidal intent can be principals to such a crime pursuant to article 25(3) (a) of the Statute. Those others, who are only aware of the genocidal nature of the campaign, but do not share the genocidal intent, can only be held liable as accessories pursuant to articles 25(3)(b) and (d) and 28 of the Statute. See Decision on the Confirmation of the Charges in the Case of *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-803-IEN), paras. 373, 375–376, 396, 398 and 401–402.

¹⁵⁵ ICJ Judgment on Genocide, para. 187. ICTY, *The Prosecutor v Jelenc*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 66, 79; ICTY, *The Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 550–552, 569 and 571.

Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY" or "the Tribunal") did in the Kupreškić et al. case:

"The *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide." (IT-95-16-T, Judgment, 14 January 2000, para. 636)¹⁵⁶

143. In the view of the Majority, the distinction between genocidal intent and persecutory intent is pivotal in cases of ethnic cleansing, a practice consisting of "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area."¹⁵⁷ This distinction is particularly relevant in cases such as the one at hand, in which allegations of forcible transfer and/or deportation of the members of the targeted group are a key component.
144. In this regard, the Majority observes that the practice of ethnic cleansing is not referred to in the 1948 Genocide Convention or in article 6 of the Statute. A proposal made during the drafting of the 1948 Genocide Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted.¹⁵⁸ Moreover, the ICJ has recently emphasised in its Judgment on Genocide that:

Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is "to destroy in

¹⁵⁶ ICJ Judgment on Genocide, para. 188. ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 62, 66; ICTR, *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-1, Trial Judgment, 13 December 2006, paras. 316 and 319–320.

¹⁵⁷ ICJ Judgment on Genocide, para. 190. ICTY, *The Prosecutor v. Jelisić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 562 and 578.

¹⁵⁸ ICJ Judgment on Genocide, para. 190. See also the Syrian proposal and amendment (UN Doc. A/C6/234) rejected by 29 votes to 5, with 8 abstentions.

whole or in part” a particular group, and deportation and displacement of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.¹⁵⁹

As the ICTY has observed, while “there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’ [. . .] yet “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.”¹⁶⁰

145. Nevertheless, in the view of the Majority, this does not mean that the practice of ethnic cleansing—which usually amounts to the crime against humanity of persecution—can never result in the commission of the crime of genocide. In this regard, the Majority considers that such a practice may result in genocide if it brings about the commission of the objective elements of genocide provided for in article 6 of the Statute and the Elements of Crimes with the *dolus specialis/specific* intent to destroy in whole or in part the targeted group.
146. Finally, in relation to the meaning of the term “part of the group” in the definition of the crime of genocide, the Majority notes that, the ICJ, following the case law of the ICTY and the ICTR, has recently held as follows:

In the first place, the intent must be to destroy at least a substantive part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR).¹⁶¹

Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe” (*ibid.*) The area of the perpetrator’s activity and control are to be considered. As the ICTY Appeals Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant. (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 13) This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed

¹⁵⁹ ICJ Judgment on Genocide, para. 190. ICTY, *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 520–522.

¹⁶⁰ ICJ Judgment on Genocide, para. 190. ICTY, *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 562; ICTY, *The Prosecutor v Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, para. 519; ICTY, *The Prosecutor v Karadžić*, Case No. IT-95-18-R61. IT-95-5-R61, Transcript of Hearing, 28 June 1996, p. 10.

¹⁶¹ ICJ Judgment on Genocide, para. 198.

indicated the need for caution, lest this approach might distort the definition of genocide. (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para.523)¹⁶²

A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms:

“The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition, to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.”¹⁶³

4. The application of the law on the proof by inference to the article 58 evidentiary standard in relation to the alleged GoS’s genocidal intent

147. The Prosecution highlights that it relies exclusively on proof by inference to substantiate its allegations concerning Omar Al Bashir’s alleged responsibility for genocide.¹⁶⁴ In particular, the Prosecution relies on inferences to prove the existence of Omar Al Bashir’s *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.¹⁶⁵
148. In this regard, the Majority observes that, according to the Prosecution, Omar Al Bashir was in full control of the “apparatus” of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, and used such State apparatus to carry out a genocidal campaign against the Fur, Masalit and Zaghawa groups.¹⁶⁶
149. As a result, the Majority considers that if the materials provided by the Prosecution support the Prosecution’s allegations in this regard, the existence of reasonable grounds to believe that Omar Al Bashir had a genocidal intent would automatically lead to the conclusion that there are also reasonable grounds to believe that a genocidal campaign against the Fur, Masalit and Zaghawa groups was a core component of the GoS counter-insurgency campaign.
150. However, the situation would be different if the materials provided by the Prosecution show reasonable grounds to believe that Omar Al Bashir shared the control over the “apparatus” of the State of Sudan with other high-ranking Sudanese political and military leaders. In this situation, the Majority is of the view that the existence of reasonable grounds to believe that one of the core components of the GoS counter-insurgency campaign was a genocidal campaign against the Fur, Masalit and Zaghawa groups

¹⁶² 1CJ Judgment on Genocide, para. 199.

¹⁶³ ICJ Judgment on Genocide, para. 200.

¹⁶⁴ *The Prosecution Application*, para. 364. See also ICC-02/05-T-2-Conf-Exp-ENG-ET at p.3. line 18 to p.4, line 5, p.6. line 12–14 and p.21, line 9.

¹⁶⁵ *The Prosecution Application*, paras 365 and 366.

¹⁶⁶ *The Prosecution Application*, paras. 244, 250–269.

would be dependent upon the showing of reasonable grounds to believe that those who shared the control of the “apparatus” of the State of Sudan with Omar Al Bashir agreed that the GoS counter-insurgency campaign would, *inter alia*, aim at the destruction, in whole or in part, of the Fur, Masalit and Zaghawa groups.

151. It is for this reason that the Majority refers throughout the rest of the present decision to “the GoS’s genocidal intent” as opposed to “Omar Al Bashir’s genocidal intent.”
152. Moreover, regardless of whether Omar Al Bashir had full control, or shared control with other high-ranking Sudanese political and military leaders, over the *apparatus* of the State of Sudan, the mental state of mid level superiors and low level physical perpetrators is irrelevant for the purpose of determining whether the materials provided by the Prosecution show reasonable grounds to believe that the crime of genocide against the Fur, Masalit and Zaghawa groups was part of the GoS counter-insurgency campaign that started soon after the April 2003 attack on El Fasher airport and continued until the filing of the Prosecution Application on 14 July 2008.¹⁶⁷
153. The Majority observes that, according to the Prosecution, an inference of the GoS’s genocidal intent “may properly be drawn from all evidence taken together, even where each factor on its own may not warrant such an inference.”¹⁶⁸
154. Furthermore, the Prosecution submits that, in order for such an inference to be drawn, the existence of the GoS’s genocidal intent “must be the only reasonable inference available on the evidence.”¹⁶⁹
155. The Majority also notes that the Prosecution, in support of its submissions on the applicable law concerning the proof by inference, places particular reliance on the case law of the Appeals Chamber of the ICTY.¹⁷⁰ In this regard, the Prosecution emphasises that, in applying the law on the proof by inference at the current stage of the proceedings, the Chamber must take into consideration that (i) the ICTY’s case law refers to a “beyond reasonable doubt” standard; and that (ii) “for the purpose of an Art. 58 application of the lower standard of reasonable grounds will instead be applicable.”¹⁷¹
156. The Majority finds the Prosecution’s submissions to be a correct statement of the law on the proof by inference applicable before this Court. In the Majority’s view, they are not only fully consistent with the ICTY¹⁷² and

¹⁶⁷ See Decision on the Confirmation of the Charges in the Case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, paras. 571–572, 573–576, 579 and 580.

¹⁶⁸ *The Prosecution Application*, para. 365.

¹⁶⁹ *The Prosecution Application*, para. 366.

¹⁷⁰ *The Prosecution Application*, paras. 365–366, footnotes 504 and 505.

¹⁷¹ *The Prosecution Application*, para. 366, footnote 505.

¹⁷² ICTY, *The Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 53–57; ICTY, *The Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Judgment, 25 February 2004, paras. 120 and 128; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, para. 333; and *The Prosecutor v Krnojelac* Case No. IT-97-25-T, Trial Judgment, 15 March 2002, para. 83.

ICTR¹⁷³ case law on the matter, but they are also supported by international human rights standards,¹⁷⁴ as well as article 22(2) of the Statute,¹⁷⁵ which fully embraces the general principle of interpretation *in dubio pro reo*.

157. In this regard, the Majority recalls that, according to the consistent interpretation of article 58 of the Statute by this Chamber, a warrant of arrest or a summons to appear shall only be issued in relation to a specific crime if the competent Chamber is satisfied that there are reasonable grounds to believe that the relevant crime has been committed and the suspect is criminally liable for it under the Statute.¹⁷⁶
158. In applying the law on the proof by inference to the article 58 evidentiary standard in relation to the existence of a GoS's genocidal intent, the Majority agrees with the Prosecution in that such a standard would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS's *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.
159. As a result, the Majority considers that, if the existence of a GoS's genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met.
160. In the Majority's view, this conclusion, besides being fully consistent with the case law of the ICTY¹⁷⁷ and ICTR¹⁷⁸ on the matter, is also required by the application of the general principle of interpretation *in dubio pro reo*,

¹⁷³ ICTR, *The Prosecutor v Seromba*, Case No. ICTR-01-66-A, Appeals Judgment, 12 March 2008, para. 176; ICTR, *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 523; ICTR, *The Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93 and 94.

¹⁷⁴ See, in particular, Article 11 of the Universal Declaration of Human Rights, Article 15 of the International Covenant on Civil and Political Rights, Article 7 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights, Article 7 of the African Charter on Human and People's Rights.

¹⁷⁵ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (A/CONF.183/DC/R.33), 27 June 1998; see also Lee, R.S. (ed) *The International Criminal Court. The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, pp. 194–195 and 212–213. See also Triffterer, O. *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Munich, CH Beck Hart Nomos, 2008, pp. 716–717 and 723–726. See also Cassese, A. (Ed.) *The Rome Statute of the International Criminal Court, a commentary*, Vol. 1, New York, Oxford University Press, 2002, pp. 746–756.

¹⁷⁶ ICC-01/04-01/07-717. paras. 263, 284, 307, 326, 338, 354, 364 and 377; ICC-01/04-01/06-803-tEN. paras. 321 and 410.

¹⁷⁷ ICTY, *The Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 53–57; ICTY, *The Prosecutor v Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, para. 333; ICTY, *The Prosecutor v Vasiljević*, Case No IT-98-32-A, Appeals Judgment, 25 February 2004, paras. 120 and 128.

¹⁷⁸ ICTR, *The Prosecutor v Seromba*, Case No. ICTR-01-66-A, Appeals Judgment, 12 March 2008, paras. 74–77 and 87; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment,

embraced by article 22(2) of the Statute.¹⁷⁹ Moreover, it constitutes the only interpretation consistent with the “reasonable suspicion” standard provided for in article 5(1)(c) of the *European Convention on Human Rights*¹⁸⁰ and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the *American Convention on Human Rights*.¹⁸¹

161. In this regard, the Majority highlights that a different interpretation would result in either an impermissible extension of the applicable law on proof by inference or in an impermissible lowering of the standard of proof that, according to article 58 of the Statute, must be met for the issuance of an arrest warrant or a summons to appear, in relation to any crime within the jurisdiction of the Court.

(b) Whether the materials provided by the Prosecution show reasonable grounds to believe in the existence of a GoS’s intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups

162. In the absence of direct evidence, the Prosecution submits that:

In the instant case, the Prosecution respectfully submits that Al Bashir’s intent to destroy the target groups as such in substantial part is the only available inference from a comprehensive consideration of [a number of] factors.¹⁸²

163. The Majority observes that the Prosecution, at paragraphs 366 *et seq* of the Prosecution Application, provides for nine different factors from which to infer the existence of a GoS’s genocidal intent.

2 September 1998 para. 523; ICTR, *The Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93–94.

¹⁷⁹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (A/CONF.183/DC/R.33), 27 June 1998. See also Lee, R.S. (ed) *The International Criminal Court The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, pp.194–195 and 212–213. See also Triffterer, *O Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Munich, CH Beck Hart Nomos, 2008, pp. 716–717 and 723–726.

¹⁸⁰ According to the ECHR, the reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary deprivation of liberty. See ECHR, *Case of Fox, Campbell and Hartley v United Kingdom*, “Judgment”, 30 August 1990, Application No. 12244/86; 12245/86; 12383/86, paras. 31–36, ECHR, *Case of K-F v. Germany*, “Judgment,” 27 November 1997, Application No. 144/1996/765/962, para. 57, ECHR, *Case of Labita v Italy*, “Judgment,” 6 April 2000, Application No. 26772/95, paras. 155–161, ECHR, *Case of Berklay v Turkey*, “Judgment,” 1 March 2001, Application No. 22493/93. para. 199; ECHR, *Case of O’Harav United Kingdom*, “Judgment,” 16 October 2001, Application No. 37555/97, paras. 34–44.

¹⁸¹ See for instance LACHR, *Case of Bámaca Velásquez v Guatemala*, “Judgment,” 25 November 2000, Series C No.70, paras. 138–144, IACHR, *Case of Loayza-Tamayo v Peru*, “Judgment,” 17 September 1997, Series C No.33, paras. 49–55, and LACHR, *Case of Gangaram-Panday v Suriname*, “Judgment,” 21 January 1994, Series C No.16. paras. 46–51.

¹⁸² *The Prosecution Application*, para. 366.

164. In the Majority's view, they can be classified into the following categories:
- i. the alleged existence of a GoS strategy to deny and conceal the crimes allegedly committed in the Darfur region against the members of the Fur, Masalit and Zaghawa groups;¹⁸³
 - ii. some official statements and public documents, which, according to the Prosecution, provide reasonable grounds to believe in the (pre) existence of a GoS genocidal policy;
 - iii. the nature and extent of the acts of violence committed by GoS forces against the Fur, Masalit, and Zaghawa civilian population.

1. Alleged GoS strategy to deny and conceal the crimes committed in Darfur, GoS official documents, and statements of Omar Al Bashir and other GoS officials

165. In relation to the alleged existence of a GoS strategy to deny and conceal the alleged commission of crimes in Darfur, the Majority considers that, even if the existence of such strategy was to be proven, there can be a variety of other plausible reasons for its adoption, such as the intention to conceal the commission of war crimes and crimes against humanity.

2. Official statements and public documents allegedly related to a GoS genocidal policy

Public Documents

166. The Prosecution places particular reliance on the following documents:
- i. A Secret Bulletin issued by the NIF (intelligence services) in 1992, which is described by the Prosecution as follows:

In 1992, following Bolad's defeat, the NIF issued a secret bulletin advocating the exclusion of the Fur from key Government positions in the intelligence service, the military and the police administration. The bulletin also advocated the destabilization of Fur areas to force the removal of the Fur from Darfur. This idea was also being propagated by a group known as the "*Arab Gathering*."¹⁸⁴

- ii. A decree issued by Omar Al Bashir in 1994, which according to the Prosecution shows that:

In 1994, AL BASHIR divided Darfur into three states with the aim and effect of diluting the political strength of the Fur by rendering them minorities in each of the three states of Darfur.¹⁸⁵

¹⁸³ *The Prosecution Application*, paras. 396–398.

¹⁸⁴ *The Prosecution Application*, para. 351.

¹⁸⁵ *The Prosecution Application*, para. 352.

- iii. A local reform enacted in March 1995 by Muhammad Ahmad Al-Fadul, which the Prosecution describes as follows:

In March 1995, Muhammad Ahmad Al-Fadul, the then Governor of West Darfur, enacted a local Government reform which shifted the balance of power in Dar Masalit, in a manner that reduced the power of the Masalit over land and potentially gave more authority to other tribes. As a result of this change, eight non-Masalit were appointed to outnumber the five Masalit in the electoral college of the tribal administration of West Darfur, creating the possibility for the first time that a non-Masalit could be selected as Sultan for Dar-Masalit. This reform provoked another war in Dar Masalit from 1996 to 1999 during which tribal Militias backed by AL BASHIR's Government killed at least 2,000 Masalit civilians and displaced 100,000, 40,000 of whom fled to Chad.¹⁸⁶

- iv. A 1986 Armed Forces Memorandum and some minutes of meetings held in 2003 by the State Security Committee from West Darfur, which the Prosecution refers to in the following terms:

In addition, GoS documents in the possession of the Prosecution, including the "Armed Forces Memorandum" referred to above and the minutes of the State Security Committee of West Darfur define details the mechanism of the plan established by AL BASHIR to ensure the coordination required [. . .] The "Armed Forces Memorandum" establishes that "The chain of command, with the administration and organization of the forces, is specified in Arts. 11 and 12 [of the Armed Forces Act of 1986], in the form of a pyramid that grants supreme command to the President of the Republic in accordance with the principle of the armed forces being subject to political command.", and "[I]n accordance with political wishes, the recommendations and orders of the Security Committees, and their duties as specified under the Constitution and the law, the armed forces, and the forces working with them, implemented military plans to contain the security situation in Darfur." [. . .] The minutes of the State Security Committee of West Darfur, confirm the existence of plans, establishing that it also acted in accordance with a *national security plan disseminated from Khartoum*.¹⁸⁷

- 167. In the Majority's view, the first three documents (the 1992 NIF Secret Bulletin, the 1994 Decree and 1995 Local Reform) do not provide, by themselves, any *indicia* of a GoS's genocidal intent. In this regard, the Majority considers that they provide, at best, *indicia* of the GoS's intent to discriminate against the members of the Fur, Masalit and Zaghawa groups by excluding them from federal government and implementing political arrangements aimed at limiting their power in their homeland (Darfur).¹⁸⁸ Whether a different

¹⁸⁶ *The Prosecution Application*, para. 354.

¹⁸⁷ *The Prosecution Application*, paras. 380–382.

¹⁸⁸ In this regard, the Majority observes that in paragraph 392 of its recent Judgment on Genocide, the ICJ found that the "Decision on the Strategic Goals of the Serbian People in Bosnia and Herzegovina", issued on 12 May 1992 by Momcilo Krajićnik (the President of the

conclusion is merited when assessed in light of the rest of the materials provided by the Prosecution in support of the Prosecution Application is a question that shall be analysed below by the Majority.

168. In relation to the 1986 Armed Forces Memorandum and the 2003 West Darfur State Security minutes, the Majority considers that they are only evidence of the internal organisation and coordination among the three different levels of government in Sudan (Federal, State and Local), and among the different bodies within each of these levels of government.
169. In the Majority's view, evidence of close coordination provides *indicia* of the existence of a well organised governmental structure through which decisions taken in the upper levels of the GoS can be effectively implemented. Nevertheless, considering the ongoing armed conflict between the SLM/A, the JEM and other armed groups (which appear to have broad social support in Darfur) and the GoS, the Majority sees no *indicia* of unlawfulness in securing a close coordination among the military, the police, the intelligence services and the civil administration, as well as among the federal, the state and the local levels of government.

Official Statements

170. The Prosecution places particular reliance on two statements allegedly made by Omar Al Bashir in March/April 2003, at a time in which peace talks with the SLM/A and the JEM broke off, and the GoS preparations for its counter-insurgency campaign were starting:
 - i. In March 2003, Omar Al Bashir is said to have declared in front of a number of members of the Sudanese Armed Forces in El Fächer that the rebellion is to be quelled in two weeks and that no prisoners or wounded are to be brought back;¹⁸⁹
 - ii. In April 2003, Omar Al Bashir, again in El Fächer, is said to have stated in front of Northern Darfur State officials and members of the Sudanese Armed Forces officials that he "did not want any villages or prisoners, only scorched earth."¹⁹⁰
171. The Prosecution also relies on a statement allegedly given on national television by Omar Al Bashir in January 2004. According to the Prosecution,

National Assembly of the self-proclaimed Serb Republic of Bosnia, Republic Srpska), did not constitute evidence of intent to destroy the Bosnian Muslim group. The relevant document reads as follows: "The Strategic Goals, i.e. the priorities of the Serbian people of Bosnia and Herzegovina are: (1) Separation as a state from the other two ethnic communities; (2) A corridor between Semberija and Krajina; (3) The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states; (4) The establishment of a border on the Una and Neretva rivers; (5) The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part; (6) An outlet to the sea for the Republika Srpska."

¹⁸⁹ *The Prosecution Application*, para. 271

¹⁹⁰ *The Prosecution Application*, para. 271

Omar Al Bashir is said to have confirmed the concept of the operation in Darfur and is said to have told the Sudanese public that he had given the Sudanese Armed Forces *carte blanche* in Darfur not to take prisoners or inflict injuries.¹⁹¹

172. The Majority is of the view that the above-mentioned statements allegedly made by Omar Al Bashir do not provide, by themselves, any *indicia* of a GoS's genocidal intent. In this regard, the Majority considers that they provide, at best, *indicia* of Omar Al Bashir's alleged individual criminal responsibility, pursuant to article 25(3)(a) of the Statute, for those war crimes and crimes against humanity that were allegedly a core component of the GoS counter-insurgency campaign. Whether a different conclusion is merited when assessed in light of the rest of the materials provided by the Prosecution in support of the Prosecution Application is a question that shall be analysed below by the Majority.
173. Finally, the Prosecution also relies on public speeches made by other members of the GoS,¹⁹² and in particular by Ahmad Muhammad Harun ("Ahmad Harun"), Deputy Minister for Internal Affairs from April 2003 until his appointment as Minister for Humanitarian Affairs in 2005:
 - i. On or around 23 July 2003, at Khirwaa, Ahmad Harun is said to have addressed an audience that included two to three hundred conscripts who were wearing military uniforms, saying that there was a need to teach the rebels a lesson and that he had provided enough soap and that the conscripts had to do the remaining cleaning job.¹⁹³
 - ii. At a public meeting in AI Geneina in July 2003, where Ahmad Harun is said to have called on the people to go to their sons and ask them to lay down their firearms, he is also said to have stated that "the President had handed over to him the Darfur security file and given him all the power and authority to kill or forgive in Darfur for the sake of peace and security," and that "for the sake of Darfur, they were ready to kill 3/4 of the people in Darfur so that a 1/4 could live";¹⁹⁴ and
 - iii. At a public meeting in Mukjar on 7 August 2003, Ahmad Harun is said to have stated that there was a rebellion against the State in Darfur, and that, since the children of the Fur had become rebels, all the Fur and what they had, had become booty for the Mujahidin";¹⁹⁵

¹⁹¹ *The Prosecution Application*, para. 275.

¹⁹² The Prosecution also refers to some statements by low level perpetrators, such as those captors of Arawala women who told them "little dogs, this land is not for you," see *Prosecution Application*, para. 138. Likewise, direct perpetrators are said to have told their victims "the Fur are slaves, we will kill them," "You are Zaghawa tribes, you are slaves," "You are Masalit. Why do you come here, why do you take our grass? You will not take anything today," see *Prosecution Application*, paras. 277 and 385.

¹⁹³ Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0020, paras.70–71;

¹⁹⁴ Witness Statement (Anx 25) DAR-OTP-00095-049 at 076-077.

¹⁹⁵ Witness Statement (Anx 65) DAR-OTP-0119-0518, at 076-077. Moreover, the Prosecution, in AnxEI to the 17 November 2008 Prosecution Submission of Supporting Material, refers to the following excerpts of witness statements, that have not been provided to the Chamber in

174. In the Majority's view, Ahmad Harun's statements contain the harsher language used by GoS officials that can be found in the materials provided by the Prosecution in support of the Prosecution Application.
175. Nevertheless, the Majority notes that there are reasonable grounds to believe that Ahmad Harun, who spent important amounts of time in Darfur, was not actually part of the highest level of the GoS in Khartoum and that his role was that of a link between the State Governors in the three Darfurian States and the said highest level of the GoS in Khartoum.¹⁹⁶
176. Furthermore, the Majority underscores that, when the Prosecution requested the issuance of a summons to appear for Ahmad Harun in 2007, for his alleged responsibility in some of the most brutal acts of violence that allegedly occurred in the Darfur region against members of the Fur, Masalit and Zaghawa civilian population, the Prosecution did not see any *indicia* of genocidal intent on his part as it was only alleged that he acted with a persecutory intent.¹⁹⁷

3. Nature and extent of the acts of violence against members of the Fur, Masalit and Zaghawa groups

Conditions within the IDP camps in Darfur and alleged GoS hindrance of humanitarian assistance as the key component of the Prosecution's allegations of the existence of a GoS's genocidal intent

full: (i) in August 2003, Ahmad Harun is said to have stated in Camp2 that "The Fur are making headache to us [. . .] We managed the south and the east, but now [. . .] they are making trouble [. . .] "God willing, we will kill them and make them homeless [. . .] and Darfur land will be suitable for people better than them; (ii) at an unknown time and location, Ahmad Harun is reported to have said that "Darfur land will not be dirtied by the . . . by the western [. . .] And upon your arrival we will never hear about those who belong to the west in Darfur"; and (iii) at an unknown time and location, Ahmad Harun is said to have told local leaders that "You the emirs . . . uh. . . Clean Darfur; wipe out the blacks and this land will be to you and your friends from Niger, from Mahamid tribe will come and . . . and live with you on this land and we are capable to change even the name of this land." See (Anx El) DAR-OTP-015 8-1165 at 1192-1193 and (Anx El) DAR-0158-0964 at 1001-1007 and at 1016-1021.

¹⁹⁶ ICC-02/05-01/07-2-Corr, p. 5; ICC-02/05-01/07-1-Corr, para. 128; *The Prosecution Application*, paras. 254-262; Meeting with Ahmed Harun, 15 January 2005 (Anx 15) DAR-OTP-0016-0013 at 0013-0016; Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0076-0077, paras. 128-129.

¹⁹⁷ The case of *The Prosecutor v against Ahmad Harun and Ali Kushayb* focuses on following four specific areas of the State of Western Darfur where there are reasonable grounds to believe that the acts of violence against the Fur population were particularly widespread and brutal (thousands of persons killed, numerous acts of rape, outrages upon personal dignity, imprisonment, torture, inhumane acts, pillaging, destruction of property and forcible transfer of the population): (i) Kodoom and surrounding areas; (ii) Bindisi and surrounding areas; (iii) Mukjar and surrounding areas; and (iv) Arawala and surrounding areas. See Warrant of Arrest for Ahmad Harun ICC-02/05-01/07-2-Corr, Count 1-9 (regarding Kodoom), Count 10-20 (regarding Bindisi), Count 21-38 (regarding Mukjar) and Count 39-51 (regarding Arawala).

177. As a result of previous findings, and as the Prosecution itself acknowledges,¹⁹⁸ the Prosecution's allegations concerning the existence of reasonable grounds to believe in a GoS's genocidal intent are essentially based on the inference that can be drawn from the alleged clear pattern of mass-atrocities committed by GoS forces between 2003 and 2008 against the Fur, Masalit and Zaghawa civilian population throughout Darfur region.
178. In particular, the Majority observes that, in order to show the existence of a GoS's genocidal intent, the Prosecution relies heavily on what the Prosecution considers to be a key component of an alleged GoS genocidal campaign: the subjection of a substantial part of the Fur, Masalit and Zaghawa civilian population of Darfur (up to 2.700.000 individuals) to unbearable conditions of life within IDP Camps due to the: (i) insufficient allocation of resources by the GoS for IDPs within Sudan; (ii) acts of violence (including murder, rape and mistreatment) committed by GoS forces within the IDP Camps; (iii) unlawful arrest of community leaders and subsequent mistreatment/torture in the facilities of HAC (which was allegedly comprised of former members of the NISS); and (iv) the GoS hindrance of access to international aid.

Prosecution's allegations concerning the GoS insufficient allocation of resources in the IDP Camps in Darfur

179. In relation to the alleged insufficient resources allocated by the GoS to ensure adequate conditions of life in IDP Camps in Darfur, the Majority considers that the Prosecution's allegation is vague in light of the fact that, in addition to the Prosecution's failure to provide any specific information as to what possible additional resources could have been provided by the GoS, there existed an ongoing armed conflict at the relevant time and the number of IDPs, according to the United Nations, was as high as two million by mid 2004, and as high as 2.7 million today.¹⁹⁹

Situation within the IDP Camps as reflected in the materials provided by the Prosecution

180. In relation to conditions inside the IDP Camps, the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application reflect a situation within the IDP Camps which significantly differs from the situation described by the Prosecution in the Prosecution Application. The Majority reaches this conclusion as a result of an overall assessment of the materials provided by the Prosecution²⁰⁰—including the following account of

¹⁹⁸ *The Prosecution Application*, paras. 364–366 and 373–374.

¹⁹⁹ See UN Press Conference by Assistant Secretary-General for Humanitarian Affairs on Humanitarian Situation in Darfur, 31 August 2007 (Anx J60) at DAR-OTP-0147-0891 at 0891.

²⁰⁰ Including, *inter alia*: Security Council 5872nd meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061-1064; United Nations Office for the Coordination of Humanitarian Affairs—Integrated Regional Information Networks, *Humanitarian access blocked in Darfur*,

the conditions since February 2004 in one of the largest IDP Camps in Darfur ("the Kalma Camp") given in the latest report issued on 23 January 2009 by the United Nations High Commissioner for Human Rights on the situation in Sudan, which indicates, *inter alia*, that during the relevant period in the Kalma Camp: (i) several violent exchanges between armed elements within the Camp and GoS forces took place; (ii) several sources referred to by UNAMID as "credible, independent sources", reported on the presence in the Camp of "light and heavy arms"; (iii) the conflict between the GoS forces and the armed elements within the Camp was a very important factor in exacerbating the tension between the IDP community and the GoS; and (iv) poor living conditions in the Camps were not systematically, but only "at times", exacerbated by measures introduced by the GoS on security grounds, and, in some circumstances, such measures were lifted at the intervention of UNAMID:

The incident at Kalma IDP camp should be analysed in the context of the long-standing tension between the residents of the camp and the Government of Sudan regarding control of the camp. South Darfur governmental authorities have frequently asserted that there is a presence of political, criminal and armed movement elements within the camp. Kalma camp was established in February 2004. As one of the largest camps in Darfur, the total population of Kalma camp is estimated at approximately 80,000 individuals: the majority being from the Fur, followed by the Dajo, Zaghawa, Massalit, Birgit and Tunjer tribes. The camp is one to two kilometers' long and extends seven kilometers' along the railway track from east to west. The camp is located 15 km east of Nyala and is divided into eight sectors; each dominated by one or more ethnic group and headed by a sheik nominated by the IDPs in the area. The camp has become tribally fragmented and is plagued by internal divisions and quasi-urban problems that often reflect the political aspirations of the different ethnic groups living in it.

Living conditions in the camp are very poor due to overcrowding, water and food shortages and the lack of basic sanitation infrastructure, which at times have been exacerbated by measures introduced by government on security grounds. For example, prior to the incident IDPs and humanitarian agencies were often unable to operate the pumps to draw water from the wells due to Government

12 January 2004 (Anx J54) DAR-OTP-0141-0175; HRW Report, *Darfur Humanitarian Aid under Siege*, May 2006 (Anx J55) DAR-OTP-0107-1076 at 1081-1084; United Nations System Standing Committee on Nutrition, *Nutrition information in crisis situations-Report number 1*, 29 February 2004 (Anx J56) DAR-OTP-0141-0165; United Nations Resident Coordinator, *Darfur Crisis, Sudan- UN Darfur Task Force Situation Report 11 Mar 2004*, 11 March 2004 (Anx J57) DAR-OTP-0141-0162; United Nations Resident Coordinator, *Darfur Crisis, Sudan. UN humanitarian situation report*, 15 Apr 2004, 15 April 2004 (Anx J58) DAR-OTP-0141-0177; Press Article, USA Today, *Malnutrition, Lawlessness are increasing in Darfur* (Anx J59) DAR-OTP-0147-0889; United Nations Mission in Sudan, *Media Monitoring Report*, 6 May 2008 (Anx J61) DAR-OTP-0147-1077 at 1080; United Nations Inter-agency Fact Finding Mission report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0069-0071; Médecins Sans Frontières, *Mornay Camp, West Darfur State, Sudan No relief in sight*, 21 June 2004 (Anx J68) DAR-OTP-0149-0529 at 0529-0532; Office of UN Resident and humanitarian co-ordinator for the Sudan, *Darfur Humanitarian Profile No 4*, 1 July 2004 (Anx J69) DAR-OTP-0149-0537 at 0543-0550.

imposed fuel restrictions, forcing them at times to utilize unclean water sources, such as rainwater. In some of these circumstances, the measures were lifted at the intervention of UNAMID.

The Government maintains a presence approximately two kilometres from the camp, through two checkpoints (one National Intelligence and Security Services (NISS) and the other of the Humanitarian Aid Commission (HAC)).

Prior to the incident, UNAMID police maintained a daily presence at Kalma camp. Following the incident and requests by IDP leadership for increased UNAMID protection, on 13 September 2008, UNAMID began maintaining a 24/7 presence in the camp.

The Government has stated that supporters of Sudanese Liberation Army/ Abdul Wahid faction (SLA/AW), Sudanese Liberation Army/Minni Minnawi faction (SLA/MM) and a much smaller presence of Justice and Equality Movement (JEM) reportedly live within the camp.

According to the Advisory Council for Human Rights of the Government of the Sudan (ACHR), between 2004 and August 2008, the South Darfur State authorities registered 75 cases of criminal offences, including numerous acts of killings and armed robberies, which are believed to have been perpetrated by gangs or individuals sheltered or living within the camp.

Since the establishment of Kalma camp, there have been several violent exchanges between armed elements within the camp and Government security forces. For example, in November 2004 members of a movement attacked the police compound outside of Kalma camp, killing 25 police officers. On 21 August 2007, the Nyala police conducted an operation at Kalma camp in which at least 35 camp residents were arrested on suspicion of alleged involvement in armed attacks on two police stations in nearby Al Salaam IDP camp on 15 August 2007 and in Urn Kunduwa on 16 August 2007. The police stated that the attackers later sought refuge and hid stolen weapons in Kalma camp. Credible, independent sources have reported the presence of light and heavy arms in Kalma camp although this information has not been verified by UNAMID.

The conflict between the Government and armed elements has exacerbated tensions between the IDP community and the Government. This tension may stem from attempts by the Government to uproot armed elements as well as significant abuses at the hands of the Government forces and its allied militia. These abuses include rape, arbitrary arrest and detention, assault, intimidation, shooting incidents, commercial bans and other forms of violence. Aid entities conducting humanitarian assistance activities in Kalma camp have faced harassment, restricted movement or entry into the camp, visa denial and other impediments impacting their ability to provide assistance in the camp. The government has also imposed fuel cuts from time to time on the camp on the grounds that fuel supplies destined for humanitarian purposes are being diverted to the movements.

Efforts to dismantle the Kalma camp or break it into smaller more manageable camps began in November 2004 at the suggestion of the Humanitarian Aid Commission. In June 2005, humanitarian agencies initiated an information campaign for voluntary relocation from Kalma Camp to Al Salaam camp, which was rejected by the Kalma IDPs due to their concern that this was the initial stages of a forced relocation.

On 21 August 2008, Judge Kamal El-Deen Ali Mohamed El-Zaki from the Nyala Criminal Court, issued a General Search Order authorizing the police to search "all

centres of Kalma IDP camp” for “arms, drugs, stolen property, detainees and anything which violates the law.” Although the warrant refers to suspicion of crimes related to unlawful possession of weapons, kidnapping, receipt of stolen property, theft and robbery, the warrant does not refer to specific individuals, locations or previously committed crimes, and appears to be a blanket warrant to search the entire camp.

In more general terms, the lack of protection of civilians, and in particular of IDPs, remains one of the most salient concerns in Darfur. Throughout Darfur, increased presence of Government security forces and armed movements in and around IDP camps has resulted in heightened vulnerability of the IDP community. Following the Kalma incident, IDP leaders in several camps expressed their concern to UNAMID that similar operations would be conducted in other IDP camps throughout Darfur.²⁰¹

Level of GoS hindrance of medical and other humanitarian assistance in the IDP Camps in Darfur as reflected in the materials provided by the Prosecution

181. In relation to the Prosecution’s allegations concerning the alleged GoS hindrance of medical and other humanitarian assistance in the IDP Camps in Darfur,²⁰² the Majority considers that hindrance of humanitarian assistance, as well as cutting off supplies of food and other essential goods, can be carried out for a variety of reasons other than intending to destroy in whole or in part the targeted group. As a result, the Prosecution’s claim must be assessed in light of the extent and systematicity, duration and consequences of the alleged GoS obstruction.
182. The Majority observes that this approach has also been taken by the ICJ in its recent Judgment on Genocide. There, the ICJ found that “civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities.”²⁰³ In reaching this conclusion, the ICJ placed particular emphasis on the fact that “UNHCR food and fuel convoys had been ‘obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces.’”²⁰⁴ The ICJ also stressed the findings contained in the conclusion of the report of the UN Commission of Experts, according to which, the blockade of humanitarian aid had been used as an important tool in the siege of Sarajevo.²⁰⁵ Furthermore, the ICJ

²⁰¹ Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, *Killing and injuring of civilians on 25 August 2008 by government security forces. Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union, ICC-02-05-179-Conf-Exp-Anx2, section on “Background and Context,” pp. 3–5.

²⁰² *The Prosecution Application*, paras. 185–188; ICC-02/05-T-2-Conf-Exp-ENG ET, p. 4, line 3 to p. 5, line 3, p. 14, lines 3–9 and p. 24, lines 21–23.

²⁰³ ICJ Judgment on Genocide, para. 328.

²⁰⁴ ICJ Judgment on Genocide, para. 324.

²⁰⁵ ICJ Judgment on Genocide, para. 324.

underscored the following evidence in relation to the siege of towns of Bosnia and Herzegovina other than Sarajevo:

For instance, with regard to Gorazde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient. [. . .] In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off [. . .]. Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment [. . .]. Similar patterns occurred in Bihac, Tuzla, Cerska, and Maglaj.²⁰⁶

183. Nevertheless, despite these findings, the ICJ concluded that it had not been conclusively established that the acts were committed with the *dolus specialis/specif* intent to destroy the targeted group in whole or in part.²⁷ In making such finding, the ICJ gave particular weight to the fact that:

The Special Rapporteur of the United Nations Commission on Human Rights was of the view that “[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croatians to flee.”²⁰⁸

184. In relation to the extent, systematicity, duration and consequences of the alleged GoS hindrance of medical and other humanitarian assistance needed to sustain life in the IDP Camps in Darfur, the Majority observes that in the additional materials provided by the Prosecution, at the request of the Chamber on 18 November 2008, the Prosecution included a chronology on the evolution of this alleged GoS practice from 2003 to the end of 2007.
185. According to the reports included in this chronology, the higher level of obstruction to humanitarian aid took place during the first year of the conflict until June 2004, at a time in which GoS forces appear to have launched their two main offensives (summer 2003 and January 2004). The lack of humanitarian assistance is explained in some reports by the GoS’s attempt to hide the magnitude of the crisis.²⁰⁹ Yet, in one of the reports, the United Nations Office for Humanitarian Affairs emphasised the late reaction and lack of coordination of the international community.²¹⁰

²⁰⁶ ICJ Judgment on Genocide, para. 327.

²⁰⁷ ICJ Judgment on Genocide, para. 328.

²⁰⁸ ICJ Judgment on Genocide, para. 328.

²⁰⁹ For year 2003, see ICC-02/05-161-Conf-AnxF, paras. 124–126. For January-June 2004, see ICC-02/05-161- Conf-AnxF, paras. 127–130.

²¹⁰ *Evaluation by UN Office for Humanitarian Affairs of Situation during the previous year* OCHA DHP No.3 June 2004, page 6, reported that access to many areas has remained hindered due to the difficulties resulting from a lack of capacity on the part of UN and other operational agencies, which had been further exacerbated by continued Government of Sudan (GoS)

186. The reports provided by the Prosecution also underline that, after the conclusion of the Moratorium on Restrictions (July 2004),²¹¹ access to the IDP Camps improved substantially and permitted Darfur to eventually become the site of “the largest world humanitarian effort.”²¹²
187. Finally, the said reports also highlight that bureaucratic barriers and difficulties in accessing a number of areas increased again in 2006. Nevertheless, despite increasing difficulties it appears that aid programmes continued to operate.²¹³
188. This, in the Majority’s view, is consistent with the account given by the latest report of the United Nations High Commissioner for Human Rights in relation to the Kalma Camp, where it is stressed that the poor living conditions existing in the Kalma Camp since its establishment in February 2004 “at times have been exacerbated by measures introduced by government on security grounds.”²¹⁴
189. As a result, the Majority considers that the materials submitted by the Prosecution in support of the Prosecution Application provide reasonable grounds to believe that the extent, systematicity and consequences of the GoS hindrance of medical and humanitarian assistance in IDP Camps in Darfur varied greatly over time. Consequently, the Majority finds that such materials reflect a level of GoS hindrance of medical and humanitarian assistance in IDP Camps in Darfur which significantly differs from that described by the Prosecution in the Prosecution Application.

delays in issuing visas and travel permits for humanitarian personnel and the slow release of essential humanitarian supplies and equipment. As of 20 May, there were at least 116 humanitarian workers awaiting either entry visas or travel permits to work in Darfur. The earliest application date pending from 3 April. (ICC-02/05-161-Conf-AnxF, para. 106).

²¹¹ According to the Prosecution (ICC-02/05-161-Conf-AnxF, para. 131), under international pressure, the GoS finally agreed to the July 2004 Moratorium on Restrictions wherein the text of the Joint Communiqué states that the Sudanese government commits to Implement a ‘moratorium on restrictions’ for all humanitarian work in Darfur -thereby recognizing restrictions—and remove any other obstacles to humanitarian work, including (i) suspension of visa restrictions for all humanitarian workers and permitting freedom of movement for aid workers throughout Darfur; (ii) permitting immediate temporary NGO registration through a simple notification process that OCHA will offer to manage on behalf of NGOs permanent registration shall be processed within 90 days; and (iii) suspension of all restrictions for the importation and use of all humanitarian assistance materials, transport vehicles, aircraft and communication equipment. According to Human Rights Watch (ICC-02/05-161-Conf-AnxF, para. 132): “To a large extent, this new process heavily contributed to the massive increase in humanitarian personnel and programs in Darfur in 2004 and 2005.”

²¹² On a statement issued on 27 March 2007, John Holmes (UN Under-Secretary General for Humanitarian Affairs) referred to the aid efforts in Darfur as “the world’s largest aid effort” (ICC-02/05-161-Conf-AnxF, para. 135).

²¹³ For the year 2006, see ICC-02/05-161-Conf-AnxF, para. 133. For the year 2007, ICC-02/05-161-Conf-AnxF, paras. 134–137.

²¹⁴ Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, *Killing and injuring of civilians on 25 August 2008 by government security forces Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union (ICC-02-05-179-Conf-Exp-Anx2, p. 5).

Prosecution's reliance on the nature and extent of the war crimes and crimes against humanity allegedly committed by GoS forces as evidence of a GoS's genocidal intent

190. The Majority observes that the second component of the Prosecution's submissions in relation to the inference of the existence of a GoS's genocidal intent from the clear pattern of mass-atrocities allegedly committed by GoS forces between 2003 and 2008 against the Fur, Masalit and Zaghawa civilian population, is based on the underlying facts of the Prosecution's allegations for war crimes and crimes against humanity that have been discussed in previous sections.
191. In this regard, the Majority notes that the Chamber has already found that there are reasonable grounds to believe that a core component of the GoS counter-insurgency campaign, which started soon after the April 2003 attack on the El Fasher airport and lasted for well over five years, was the unlawful attack on that part of the civilian population of Darfur—belonging largely to the Fur, Masalit and Zaghawa groups—perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing conflict in Darfur.²¹⁵
192. In particular, the majority observes that there are reasonable grounds to believe that as part of the GoS counter-insurgency campaign, GoS forces:
 - i. carried out numerous unlawful attacks, followed by systematic acts of pillage, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups;²¹⁶
 - ii. subjected thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of murder, as well as to acts of extermination;²¹⁷
 - iii. subjected thousands of civilian women, belonging primarily to the said groups to acts of rape;²¹⁸
 - iv. subjected hundreds of thousands of civilians belonging primarily to the said groups to acts of forcible transfer;²¹⁹ and
 - v. subjected civilians belonging primarily to the said groups to acts of torture.²²⁰
193. Nevertheless, the Majority considers that the existence of reasonable grounds to believe that GoS forces carried out such serious war crimes and crimes against humanity in a widespread and systematic manner does not automatically lead to the conclusion that there exist reasonable grounds to believe that the GoS intended to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups.

²¹⁵ See section above on War Crimes.

²¹⁶ See section above on War Crimes.

²¹⁷ See section above on Crimes against Humanity.

²¹⁸ See section above on Crimes against Humanity.

²¹⁹ See section above on Crimes against Humanity.

²²⁰ See section above on Crimes against Humanity.

194. In this regard, the Majority observes that a similar approach has recently been taken by the ICJ in its Judgment on Genocide, in which, leaving aside the specific events following the fall of Srebrenica, the ICJ declined to infer that the Bosnian Serb leadership acted with a genocidal intent from the existence of a clear pattern of mass-atrocities affecting hundreds of thousands of Bosnian Muslims for a period of five years, including *inter alia*:
- i. the mass killings of tens of thousands of Bosnian Muslim civilians and prisoners of war;
 - ii. the mass rapes of tens of thousands of Bosnian Muslim civilian women;
 - iii. the deportation and forcible displacement of hundreds of thousands of Bosnian Muslim civilians;
 - iv. the widespread and systematic beatings, torture and inhumane treatment (malnutrition and poor health conditions) in dozens of detention camps throughout Bosnia and Herzegovina;
 - v. the siege of Bosnian Muslim civilians in cities throughout Bosnia and Herzegovina, such as Sarajevo, where shelling, sniping and starvation by hindering humanitarian aid was a matter of course; and
 - vi. the destruction of cultural, religious and historical property in an attempt to wipe out the traces of the existence of the Bosnian-Muslim group from Bosnia and Herzegovina.²²¹
195. Moreover, the Majority finds that there are a number of additional factors, resulting from the materials provided by the Prosecution, that must be taken into consideration in determining whether the existence of reasonable grounds to believe that the GoS acted with genocidal intent is the only reasonable conclusion from the commission by GoS forces, in a widespread and systematic manner, of the above-mentioned war crimes and crimes against humanity.
196. First, in relation to the attacks conducted by the GoS forces on towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups, the Majority finds that there are reasonable grounds to believe that in most of such attacks, the large majority of their inhabitants were neither killed nor injured despite the fact that the attackers, in addition to often counting on aerial support, either had previously encircled the targeted village or came to such village with tens or hundreds of vehicles and camels forming a wide line.²²²
197. Second, the Majority observes that the Prosecution does not claim that GoS forces established in Darfur long-lasting detention camps where inmates were systematically mistreated, tortured and executed.
198. Third, in relation to forcible displacement resulting from the attacks, the Majority is of the view that there are reasonable grounds to believe that GoS forces did not attempt to prevent civilians belonging to the Fur, Masalit and

²²¹ See ICJ Judgment on Genocide, paras. 216–277, 319, 328, 334, 344 and 354.

²²² The Prosecution Application, paras. 106 and 112. See section above on *Crimes against Humanity*.

Zaghawa groups from crossing the border to go to refugee camps in Chad,²²³ and that the great majority of those who left their villages after the attacks by GoS forces reached IDP Camps in Darfur or refugee camps in Chad.

199. Fourth, in the view of the Majority, the Prosecution has failed to substantiate its claim that the materials that it submitted provide reasonable grounds to believe that Janjaweed militiamen were stationed around IDP Camps for the purpose of raping those women and killing those men who ventured outside the camps.²²⁴
200. Fifth, the Chamber observes that, in the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*, the Prosecution never claimed that the existence of reasonable grounds to believe in a GoS's genocidal intent could be inferred from the facts of the case, although there are reasonable grounds to believe that the crimes that are the subject of such case are allegedly among the gravest that occurred in Darfur in terms of their systematicity and brutality.
201. As a result, the Majority considers that the existence of reasonable grounds to believe that the GoS acted with genocidal intent is not the only reasonable conclusion of the alleged commission by GoS forces, in a widespread and systematic manner, of the particularly serious war crimes and crimes against humanity mentioned above. Whether a different conclusion is merited when assessed in light of the other materials provided by the Prosecution in support of the Prosecution Application shall be analysed by the Majority in the following section.

4. Conclusion

202. The Majority observes that the Prosecution acknowledges that it has no direct evidence of the GoS's genocidal intent and that it therefore relies on proof by inference.²²⁵
203. In light of this circumstance, the Majority agrees with the Prosecution in that the article 58 evidentiary standard would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe that the GoS acted with a *dolus specialis*/

²²³ *The Prosecution Application*, paras. 160–162, 166. and 167. See section above on *Crimes against Humanity*.

²²⁴ *The Prosecution Application*, paras. 123–124, 132, 137, 144, 145, 158, 163, 165 and 170; Witness Statement (Anx J90) DAR-OTP-0119-0048 at 0053-0054, 006h US Agency for International Development Report, *The use of rape as a weapon of war in the conflict in Darfur, Sudan*, October 2004 (Anx J18) DAR-OTP-0005-0108 at 0126-0127. 0129-0131; UN General Assembly, Human Rights Council, *Human Rights Situations that Require the Council's Attention* (A/HRC/7/22), 3 March 2008 (Anx J28) DAR-OTP-0148-0259 at 0269-0270; UN monthly report of the Secretary-General on Darfur, 8 November 2006 (Anx J33) DAR-OTP-0147-1102 at 1105-1106; UNSC, Report of the Secretary-General on Darfur, 27 July 2007 (Anx J34) DAR-OTP-0147-1111 at 1115.

²²⁵ *The Prosecution Application*, paras. 364–366 and 400; ICC-02/05-T-2-Conf-Exp-ENG ET, p. 3, lines 16–20, p. 6, lines 9–14, p. 71, lines 8–16 and p. 74, lines 20–23.

specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups.

204. In this regard, the Majority recalls that the above-mentioned analysis of the Prosecution's allegations concerning the GoS's genocidal intent and its supporting materials has led the Majority to make the following findings:

- i. even if the existence of an alleged GoS strategy to deny and conceal the crimes committed in Darfur was to be proven, there can be a variety of plausible reasons for its adoption, including the intention to conceal the commission of war crimes and crimes against humanity;
- ii. the Prosecution's allegations concerning the alleged insufficient resources allocated by the GoS to ensure adequate conditions of life in IDP Camps in Darfur are vague in light of the fact that, in addition to the Prosecution's failure to provide any specific information as to what possible additional resources could have been provided by the GoS, there existed an ongoing armed conflict at the relevant time and the number of IDPS s, according to the United Nations, was as high as two million by mid 2004, and as high as 2.7 million today;
- iii. the materials submitted by the Prosecution in support of the Prosecution Application reflect a situation within the IDP Camps which significantly differs from the situation described by the Prosecution in the Prosecution Application;
- iv. the materials submitted by the Prosecution in support of the Prosecution Application reflect a level of GoS hindrance of medical and humanitarian
- v. assistance in IDP Camps in Darfur which significantly differs from that described by the Prosecution in the Prosecution Application;
- vi. despite the particular seriousness of those war crimes and crimes against humanity that appeared to have been committed by GoS forces in Darfur between 2003 and 2008, a number of materials provided by the Prosecution point to the existence of several factors indicating that the commission of such crimes can reasonably be explained by reasons other than the existence of a GoS's genocidal intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups;
- vii. the handful of GoS official statements (including three allegedly made by Omar Al Bashir himself) and public documents relied upon by the Prosecution provide only *indicia* of a GoS's persecutory intent (as opposed to a genocidal intent) against the members of the Fur, Masalit and Zaghawa groups; and
- viii. as shown by the Prosecution's allegations in the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*, the Prosecution has not found any *indicia* of genocidal intent on the part of Ahmad Harun, in spite of the fact that the harsher language contained in the above-mentioned GoS official statements and documents comes allegedly from him.

205. In the view of the Majority, when all materials provided by the Prosecution in support of the Prosecution Application are analysed together, and consequently, the above-mentioned findings are jointly assessed, the Majority

cannot but conclude that the existence of reasonable grounds to believe that the GoS acted with a *dolus specialis*/ specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups is not the only reasonable conclusion that can be drawn therefrom.

206. As a result, the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application fail to provide reasonable grounds to believe that the GoS acted with *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups, and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to counts 1 to 3.
207. Nevertheless, the Majority considers that, if, as a result of the ongoing Prosecution's investigation into the crimes allegedly committed by Omar Al Bashir, additional evidence on the existence of a GoS's genocidal intent is gathered, the Majority's conclusion in the present decision would not prevent the Prosecution from requesting, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir so as to include the crime of genocide.
208. In addition, the Prosecution may always request, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir to include crimes against humanity and war crimes which are not part of the Prosecution Application, and for which the Prosecution considers that there are reasonable grounds to believe that Omar Al Bashir is criminally liable under the Statute.

B. Whether there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for the crimes mentioned above²²⁶

209. The Prosecution alleges that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute for committing genocide, crimes against humanity and war crimes through the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, from March 2003 to 14 July 2008.²²⁷
210. At the outset, the Chamber highlights that, in the *Lubanga* and the *Katanga and Ngudjolo* cases, the Chamber has held that article 25(3)(a) of the Statute embraces the notion of control of the crime as the determining criterion to distinguish between principal and accessory liability.²²⁸ Furthermore, as the Chamber has held in the said cases, article 25(3)(a) of the Statute also embraces the following four manifestations of the notion of control of the crime: direct perpetration, perpetration through another person or indirect perpetration, co-perpetration based on joint control and indirect co-perpetration.²²⁹

²²⁶ Judge Anita Usacka appends a partly dissenting opinion in relation to paragraphs 214, 216 and 223. See Partly Dissenting Opinion of Judge Anita Uäacka, Part IV.

²²⁷ *The Prosecution Application*, paras. 62 and 244.

²²⁸ ICC-01/04-01/06-803-CEN, para. 330.

²²⁹ ICC-01/04-01/06-803-tEN, paras. 326–328.

211. In relation to the notion of indirect perpetration, the Chamber highlighted in the decision on the confirmation of the charges in the *Katanga and Ngudjolo* case that:

The leader must use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organisation to secure compliance with his orders. Compliance must include the commission of any of the crimes under the jurisdiction of this Court.²³⁰

212. In relation to the notion of co-perpetration based on joint control, the decisions on the confirmation of the charges in the *Lubanga* and *Katanga and Ngudjolo* cases have underscored that:

[t]he concept of co-perpetration based on joint control over the crime is rooted in the principle of division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.²³¹

213. As the Chamber has already held, the notion of indirect co-perpetration is applicable when some or all of the co-perpetrators carry out their respective essential contributions to the common plan through another person.²³² As the Chamber has underscored, in these types of situations:

Co-perpetration or joint commission through another person is nonetheless not possible if the suspects behaved without the concrete intent to bring about the objective elements of the crime and if there is a low and unaccepted probability that such would be a result of their activities.²³³

214. The Majority finds that there are reasonable grounds to believe that soon after the April 2003 attack on the El Fasher airport, a common plan to carry out a counter- insurgency campaign against the SLM/A, the JEM and other armed groups opposing the GoS in Darfur, was agreed upon at the highest level of the GoS, by Omar Al Bashir and other high-ranking Sudanese political

²³⁰ ICC-01/04-01/07-717, para. 514.

²³¹ ICC-01/04-01/06-803-tEN, para. 342. See also ICC-01/04-01/07-717, para. 521.

²³² ICC-01/04-01/07-717, para. 522.

²³³ ICC-01/04-01/07-717, para. 537.

and military leaders,²³⁴ in particular [REDACTED],²³⁵ [REDACTED],²³⁶ [REDACTED]²³⁷ and [REDACTED].²³⁸

215. The Chamber also finds that there are reasonable grounds to believe that a core component of such common plan was the unlawful attack on that part of the civilian population of Darfur—belonging largely to the Fur, Masalit and Zaghawa groups—perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur.²³⁹ Furthermore, the Chamber considers that there are reasonable grounds to believe that, according to the common plan, the said civilian population was to be subjected to unlawful attacks, forcible transfers and acts of murder, extermination, rape, torture, and pillage by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.²⁴⁰
216. Furthermore, the Majority finds that there are reasonable grounds to believe that Omar Al Bashir and the other high-ranking Sudanese political and

²³⁴ Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0013, para. 41; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, para. 48.

²³⁵ Witness Statement (Anx B4) DAR-OTP-0147-0071 at 0110-0120; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0016 para. 70; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0013, para. 41, and at 0024, para. 88; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0024, para. 88; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, paras. 47 and 48.

²³⁶ Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0610, para. 144; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0013, para. 41, at 0023, para. 81 and at 0029, para. 112.

²³⁷ Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0017, para. 74; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0016-0017, para. 55, at 0025, para. 89, and at 0029, para. 112; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0025, para. 89, and at 0029, para. 112.

²³⁸ Witness Statement (Anx J95) DAR-OTP-0095-0003 at 0025, para. 92.

²³⁹ Witness Statement (Anx B4) DAR-OTP-0147-0071 at 0110-0120; Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0088, para. 51; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0480, para. 32. *The Prosecution Application*, paras. 9 and 240; HRW Report, *Sudan-Darfur in Flames Atrocities in Western Sudan*, April 2004 (Anx 10) DAR-OTP-0003-0185 at 0194; See also. International Crisis Group Report, *Darfur Deadline A New International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055 at 0057, 0059, 0061, 0064, 0065 and 0068; Information Report on Background. Q&A (Anx 14) DAR-OTP-0014-0213 at 0214; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0027, 0058, 0030-0040; HRW Report, *If We Return, We Will Be Killed Consolidation of Ethnic Cleansing in Darfur, Sudan*, November 2004 (Anx 38) DAR-OTP-0107-1403 at 1405. Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62–63; *The Prosecution Application*, paras. 241–242; J. Flint / A. de Waal, *Darfur A Short History of a Long War*, 2005 (Anx 75) DAR-OTP-0120-0678 at 0772-0775; Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3–4 September 2003 (Anx 50) DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement at DAR-OTP-0115-0563 at 0567-0638.

²⁴⁰ Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62–63. *The Prosecution Application*, paras. 241–242; J. Flint / A. de Waal, *Darfur A Short History of a Long War*, 2005 (Anx 75) DAR-OTP-0120-0678 at 0772-0775. Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army. 3–4 September 2003 (Anx 50) DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement (Anx 44) DAR-OTP-0115-0563 at 0567-0638.

military leaders directed the branches of the “apparatus” of the State of Sudan that they led, in a coordinated manner, in order to jointly implement the common plan.

217. In particular, the Chamber finds that there are reasonable grounds to believe that the common plan was, to a very important extent, implemented through State and local Security Committees in Darfur.
218. In this regard, the Chamber considers that there are reasonable grounds to believe that Local Security Committees (i) were comprised of the head of the locality, and representatives of the Sudanese Armed Forces, the Sudanese Police Forces, and the NISS at the local level; (ii) worked together with local Janjaweed Militia leaders to implement the common plan in the relevant area; and (iii) reported to the State Governor.²⁴¹
219. The Chamber also considers that there are reasonable grounds *to believe that each of the three Darfurian States had one State Security Committee, which (i) was comprised of the State Governor and representatives of the Sudanese Armed Forces, the Sudanese Police Forces and NISS at the State level;*⁴² (ii) worked together with regional Janjaweed Militia leaders to implement the common plan in the relevant State; and (iii) reported through the Deputy Federal Minister of the Interior [REDACTED].
220. In this regard, in the view of the Chamber, there are reasonable grounds to believe that, while in his position as Deputy Federal Minister of the Interior, Ahmad Harun, who was often in Darfur, was entrusted with the tasks of (i) supervising the three Darfurian State Security Committees, and (ii) acting as a link between the government of the three Darfurian States and the highest level of the GoS in Khartoum.²⁴³

²⁴¹ Witness Statement (Anx J6) DAR-OTP-0124-0196 at 0215, para. 120; *National Security Forces Act*, 1999, articles 38-40 (Anx J79) DAR-OTP-0021-Q412 at 0424-0425; *The Interim National Constitution of the Republic of the Sudan* 2005, article 150 (Anx. J80) DAR-OTP-0136-0605 at 0663-0664; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0013, paras. 59–60, 64, 66 and 119–121; Witness Statement (Anx 25) DAR-OTP-0095- 0049 at 0058, paras. 40 and 62; Unofficial version of the *Armed Forces Memorandum concerning the ICC's inquiries—Military Operations Summary since January 2002*, DAR-OTP-0116-0721, para. 38.

²⁴² *The Interim National Constitution of the Republic of the Sudan* 2005, article 150 (Anx. J80) DAR-OTP-0136- 0605 at 0663-0064; *The National Security forces Act* (Anx. J79), 1999, article 17. Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 144; International Mission of Inquiry on Darfur, Mission to West Darfur, 11–17 November 2004, Compiled notes of meetings and interviews (Anx 16) DAR-00016-139 at 0171.

²⁴³ Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0018-0019, paras. 85–86.

221. The Chamber also finds that there are reasonable grounds to believe that Omar Al Bashir, as *de jure*²⁴⁴ and *de facto*²⁴⁵ President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the common plan.²⁴⁶
222. Furthermore, the Chamber finds that, in the alternative, there are reasonable grounds to believe that Omar Al Bashir (i) played a role that went beyond coordinating the implementation of the common plan; (ii) was in full control of all branches of the “apparatus” of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, and (iii) used such control to secure the implementation of the common plan.²⁴⁷
223. As a result, the Chamber finds that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator,²⁴⁸ for those war crimes and crimes against humanity for which the Chamber has already found in the present decision that there are reasonable grounds to believe that they were directly committed, as part of the GoS counter-insurgency campaign, by members of GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.

²⁴⁴ *The Interim National Constitution of the Republic of the Sudan 2005*, articles 3. 58 (Anx. J80) DAR-OTP- 0136-0605 at 0607, 0625-0626; *National Security Forces Act, 1999*, article 14 (Anx J79) DAR-OTP-0021-0412 at 0416-0417; See, ICTY, *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Appeals Judgment, date 20 February 2001, para. 76: “As noted by the Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia*, “[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures” and citing *Case Concerning Certain German Interests in Polish Upper Silesia*, Merits, 25 May 1926, PICJ Rep., Series A, No. 7. p. 19. See also Opinion No 1 of the *Arbitration Commission of the Peace Conference on Yugoslavia*, 29 November 1991, para. 1 c, which states that ‘the form of internal political organisation and the constitutional provisions are mere facts’.

²⁴⁵ Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 132; and Witness Statement (Anx 28) at DAR-OTP-0097-0619 at 0624, para. 21. See also Amnesty International Report, *Sudan, Darfur ‘Too many people killed for no reason*, 3 February 2004 (Anx 18) DAR-OTP-0020-0067 at 0099.

²⁴⁶ Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0057, para. 40; and at 0068-0069, paras. 94–95.

²⁴⁷ The following evidence refers to the fact that Ahmad Harun’s orders came directly from Omar Al Bashir: Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 142; Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0091, para. 166. Transcript of Witness Statement (Anx 15) DAR-OTP-0016-0013 at 0013; DAR-OTP-0095-0049 at 0076, para. 128 (Anx. 25); Witness Statement (Anx J86) DAR-OTP-0128-0042 at 0052, para. 55. Moreover, according to the Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, para. 47.

²⁴⁸ See Partly Dissenting Opinion of Judge Anita Uäacka, Part IV.

V. WHETHER THE SPECIFIC REQUIREMENTS UNDER ARTICLE 58 OF THE STATUTE FOR THE ISSUANCE OF A WARRANT OF ARREST HAVE BEEN MET

A. The Prosecution's allegations

224. In its Application, the Prosecution requests the issuance of a warrant of arrest for Omar Al Bashir.²⁴⁹
225. The Prosecution Application states that Omar Al Bashir has “consistently challenged the Court’s jurisdiction and categorically refused that any Sudanese citizen be surrendered to the Court,”²⁵⁰ and that, as a result of his position as Head of State, he is in a position to attempt to obstruct proceedings and to possibly threaten witnesses.²⁵¹
226. Additionally, the Prosecution refers to its filing of 27 May 2008,²⁵² in which it reported that despite initially providing some cooperation to the Court,²⁵³ since the issuance of the arrest warrants against Ahmad Harun and Ali Kushayb, the Government of Sudan has ceased all such cooperation. The Prosecution Application states that there has been no change to this situation since that date.²⁵⁴

B. The Chamber's evaluation according to article 58(1) of the Statute

227. As this Chamber has previously noted,²⁵⁵ article 58(1) of the Statute requires the Chamber, where it is satisfied that there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court,²⁵⁶ to issue a warrant of arrest for a person if it is satisfied that the arrest of the person appears necessary for one of the following reasons:
- (i) to ensure the person’s appearance at trial;
 - (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
 - (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.
228. The Chamber observes firstly that, according to the materials provided by the Prosecution, the GoS, presided over by Omar Al Bashir, has systematically refused any cooperation with the Court since the issuance of an arrest warrant for Ahmad Harun and AH Kushayb on 2 May 2007.²⁵⁷

²⁴⁹ *The Prosecution Application*, para. 413.

²⁵⁰ *The Prosecution Application*, para. 412.

²⁵¹ *The Prosecution Application*, para. 412.

²⁵² ICC-02/05-01/07-36-US-Exp and Anxl-2.

²⁵³ ICC-02/05-01/07-36-US-Exp-Anxl, para. 22.

²⁵⁴ *The Prosecution Application*, para. 411.

²⁵⁵ ICC-02/05-01/07-l-Corr, para. 126.

²⁵⁶ Article 58(1)(a) of the Statute.

²⁵⁷ *The Prosecution Application*, paras. 339–343.

229. In particular, the Chamber notes that the embassy of the State of Sudan in The Hague, The Netherlands, refused on 2 May 2007 and 11 June 2007, to receive from an officer from the Court's Registry, the cooperation request for the arrest and surrender of Ahmad Harun and Ali Kushayb.²⁵⁸ Furthermore, on 18 March 2008, the Registry submitted a report on the execution of the warrants of arrest for Ahmad Harun and Ali Kushayb, in which the Registry reported that "[REDACTED] refused to accept the documents. He indicated that following his government's instructions, he could not receive documents from the Court."²⁵⁹
230. Moreover, the Chamber is also mindful that, upon the issuance of the warrant of arrest for Ahmad Harun for his alleged responsibility, *inter alia*, for the commission of serious violations of international humanitarian law in the Darfur region, Omar Al Bashir appears to have personally maintained the suspect in his position as Federal Minister for Humanitarian Affairs.²⁶⁰
231. The Chamber also finds that the materials submitted by the Prosecution in support of the Prosecution Application do not show any change from the absolute lack of cooperation of the GoS with the Court, referred to in the Prosecution's filing of 29 May 2008. Quite the contrary, the Chamber observes that, upon the filing of the public summary of the Prosecution Application for a *warrant of arrest* against Omar Al Bashir on 14 July 2008, it appears that Omar Al Bashir himself has been particularly defiant of the jurisdiction of the Court in several of his public statements.²⁶¹
232. On this basis, the Chamber is satisfied that the arrest of Omar Al Bashir appears necessary to ensure his appearance at trial in accordance with article 58(l)(b)(i) of the Statute.
233. As the Chamber has already found, there are reasonable grounds to believe that Omar Al Bashir is in control of the "apparatus" of the State of Sudan, or at least shares such control with a few high-ranking Sudanese political and military leaders.²⁶² As a result, he is in a position to attempt to obstruct

²⁵⁸ ICC-02/05-01/07-7-Conf and Anx. See also ICC-02/05-01/07-21-Conf, paras. 6-7 and ICC-02/05-01/07-21-Conf-AnxF.

²⁵⁹ ICC-02/05-01/07-35-Conf-Exp, p. 8.

²⁶⁰ *The Prosecution Application*, para. 267.

²⁶¹ *The Prosecution Application*, paras. 341-343, 396 and 397. Also see *China Daily* 'Sudan reiterate rejection of ICC jurisdiction' 14 July 2008 at http://www.chinadaily.com.cn/world/2008-07/14/content_6843988.htm; McDoom, O. *International Herald Tribune* 'Thousands rally in Sudan against ICC move' 13 July 2008 at <http://www.ihlcom/articles/reilers/2008/0713/arnca-01k.WD-1'K-SI'DAN-IC'C-PRO11SI.php>; BBC *World News* 'Sudan president defiant in Darfur' 23 July 2008 at <http://www.bbc.co.uk/2/hi/africa/7520991.stm>; Embassy of the Republic of the Sudan, Washington DC, Press Release 'Ocampo's Political Pursuits Jeopardize Peace' 7 November 2008 at [http://search.globescope.com/Sudan/index.php?inact=\e\&inlnl01.delaI.O&cntnlU\)larticleid=49&cntnl\(JlrelurmdH02; and Sudan Tribune 'Sudan accuses ICC of working to destabilize the country' 24 February 2009 at \v\v\v.sudantribunc.com/spip.php?article30268-9 uur geleden](http://search.globescope.com/Sudan/index.php?inact=\e\&inlnl01.delaI.O&cntnlU)larticleid=49&cntnl(JlrelurmdH02; and Sudan Tribune 'Sudan accuses ICC of working to destabilize the country' 24 February 2009 at \v\v\v.sudantribunc.com/spip.php?article30268-9 uur geleden)

²⁶² *The Prosecution Application*, paras. 250-269, 280-287; Witness Statement (Anx J86) at DAR-OTP-0128-0042 at 0052, paras. 54 and 57; Witness Statement (Anx J47) DAR-OTP-0125-0665 at 0687-0690, paras 108-112, 116, 120-121, 0698; Witness Statement (Anx J48) DAR-OTP-0016-0080

proceedings and to possibly threaten witnesses. In this regard, the Chamber observes with grave concern that it appears that at least one individual has been recently convicted for the crime of treason as a result of his alleged cooperation with the Court.²⁶³

234. The Chamber is therefore satisfied that, in accordance with article 58(1)(b) (ii) of the Statute, the arrest of Omar Al Bashir appears necessary in order to ensure that he does not obstruct or endanger the proceedings.
235. Finally, the Chamber takes note that the latest report issued on 23 January 2009 by the United Nations High Commissioner for Human Rights on the situation in the Sudan, entitled “Killing and injury of civilians on 25 August 2008 by governmental security forces: Kalma IDP Camp, South Darfur, Sudan,” concludes that GoS forces appear to continue to commit some of the crimes within the jurisdiction of the Court for which an arrest warrant for Omar Al Bashir is issued, on the basis of the present decision.²⁶⁴
236. As a result, and given that there are reasonable grounds to believe that Omar Al Bashir is the *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces, the Chamber is satisfied that his arrest appears also necessary, pursuant to article 58(1)(b) (iii) of the Statute, to prevent Omar Al Bashir from continuing to commit the above-mentioned crimes.

VI. EXECUTION OF THE WARRANT OF ARREST

A. Competent organ to make and transmit the cooperation request for arrest and surrender of Omar Al Bashir

237. As the consistent case law of this Chamber has held, the Chamber is the only competent organ of the Court which may: (i) issue and amend a warrant of arrest; (ii) coordinate with the national authorities of the requested State concerning any incident which might affect the surrender of the person to the Court once the person has been arrested; and (iii) thoroughly follow up on the execution of cooperation requests for both arrest and surrender of the relevant person.²⁶⁵ Hence, the Chamber, assisted by the Registry, in accordance with rules 176(2) and 184 of the Rules, must be regarded as

at 0089; Witness Statement (Anx J83) DAR-OTP-0060-0247 at 0255-0256, para. 53; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0006, 0019, paras 15, 66; UN Interim Report on the situation of human rights in the Sudan, 18 November 1993 (Anx 46) DAR-OTP-0115-0699 at 0715; Witness Statement (Anx J86) DAR-OTP-0128-0042 at 0050-0051; Witness Statement (Anx 23) DAR-OTP-0094-0064 at 0573; *See section B above*: Whether there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for the crimes mentioned above.

²⁶³ ICC-02/05-179-Anxl, paras. 21–22.

²⁶⁴ Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan. *Killing and injuring of civilians on 25 August 2008 by government security forces Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union, ICC-02-05-179-Conf-Exp-Anx2.

²⁶⁵ ICC-01/04-520-Anx2, para. 131; ICC-02/05-01/07-1-Coir, para.135.

the only organ of the Court competent to make and transmit a cooperation request for arrest and surrender.²⁶⁶

238. The Chamber also considers that it is necessary for the protection and privacy of witnesses and victims within the meaning of article 57(3)(c) of the Statute, that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit to the Chamber and the Registry as soon as possible, any information related to the potential risks that the transmission of the cooperation requests for the arrest and surrender of Omar Al Bashir, may cause to victims and witnesses.
239. Furthermore, the Chamber considers that it would be beneficial for the expeditious execution of the cooperation requests for arrest and surrender of Omar Al Bashir that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit as soon as possible, to the Chamber and the Registry, any information that, in the view of the Prosecution, would facilitate the expeditious execution by national authorities of such cooperation requests for arrest and surrender.

B. Obligation of the State of Sudan to fully execute the Court's cooperation request

240. The Chamber observes that the State of Sudan is not a party to the Statute and has not made any declaration pursuant to article 12(3) of the Statute and rule 44 of the Rules.
241. Nevertheless, the Chamber emphasises that the State of Sudan has the obligation to fully cooperate with the Court.
242. In this regard, the Chamber notes that the case against Omar Al Bashir has arisen out of the investigation into the Darfur situation, which was the subject of the United Nations Security Council's referral, pursuant to article 13 (b) of the Statute.
243. The Chamber also observes that, as provided for by article 13(b) of the Statute, the United Nations Security Council decided to refer the Darfur Situation to the Court in Resolution 1593 issued under Chapter VII of the Charter of the United Nations, on 31 March 2005.²⁶⁷
244. Furthermore, the Chamber highlights that the United Nations Security Council, after making an express determination that "the situation in Sudan continues to constitute a threat to international peace and security,"²⁶⁸ decided in the dispositive part of its Resolution 1593 that "the Government of Sudan and all other parties to the conflict in Darfur *shall cooperate fully with and provide any necessary assistance to the Court* and the Prosecutor pursuant to this resolution."²⁶⁹

²⁶⁶ ICC-02/05-01/07-1-Corr, para. 135; ICC-02/04-01/05-1, pp. 6–7.

²⁶⁷ UN Security Council Resolution, S/RES/1593 (2005), p. 1.

²⁶⁸ UN Security Council Resolution, S/RES/1593 (2005), p. 1.

²⁶⁹ UN Security Council Resolution, S/RES/1593 (2005), p. 1 (emphasis added).

245. In this regard, the Chamber notes that according to articles 24(1) and 25 of the United Nations Charter, the members of the United Nations, including the State of Sudan (i) “confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”; and (ii) “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”
246. Furthermore, according to article 103 of the United Nations Charter, “[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”
247. As a result, the Chamber finds that the GoS’s obligations, pursuant to United Nations Security Council Resolution 1593, to *cooperate fully with and provide any necessary assistance to the Court* shall prevail over any other obligation that the State of Sudan may have undertaken pursuant to “any other international agreement.”
248. Moreover, the Chamber emphasises that, according to article 87(7) of the Statute, if the GoS continues failing to comply with the above-mentioned cooperation obligations to the Court, the competent Chamber “may make a finding to that effect” and decide to “refer the matter [. . .] to the Security Council.” In this regard, the Chamber is mindful that, according to articles 41 and 42 of the United Nations Charter:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

249. Finally, the Chamber highlights that, in relation to States other than Sudan, as well as regional and international organisations, the dispositive part of United Nations Security Council Resolution 1593 expressly states the following in relation to their cooperation with the Court:

While recognizing that States not party to the Rome Statute have no obligation to the Statute, [the United Nations Security Council] urges all States and concerned regional and other international organisations to cooperate fully.”²⁷⁰

²⁷⁰ United Nations Security Council Resolution 1593, S/RES/1593 (2005), issued on 31 March 2005. p. 1.

FOR THESE REASONS

DECIDES to issue a warrant of arrest for Omar Al Bashir for his alleged responsibility for crimes against humanity and war crimes under article 25(3) (a) of the Statute for:

- i. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities as a war crime within the meaning of article 8(2)(e)(i) of the Statute;
- ii. pillage as a war crime within the meaning of article 8(2)(e)(v) of the Statute;
- iii. murder as a crime against humanity within the meaning of article 7(l)(a) of the Statute;
- iv. extermination as a crime against humanity within the meaning of article 7(l)(b) of the Statute;
- v. rape as a crime against humanity within the meaning of article 7(l)(g) of the Statute;
- vi. torture as a crime against humanity within the meaning of article 7(1)(f) of the Statute;
- vii. forcible transfer as a crime against humanity within the meaning of article 7(l)(d) of the Statute;

DECIDES that the warrant of arrest for Omar Al Bashir shall be included in a separate self-executing document containing the information required by article 58(3) of the Statute;

DECIDES that, as soon as practicable, the Registry: (i) shall prepare a request for cooperation seeking the arrest and surrender of Omar Al Bashir and containing the information and documents required by articles 89(1) and 91 of the Statute, and by rule 187 of the Rules; and (ii) shall transmit such request to the competent Sudanese authorities in accordance with rule 176(2) of the Rules and to the following States:

- i. All States Parties to the Statute;
- ii. All United Nations Security Council members that are not States Parties to the Statute.

DIRECTS the Registrar, as appropriate, to prepare and transmit to any other State any additional request for arrest and surrender which may be necessary for the arrest and surrender of Omar Al Bashir to the Court pursuant to articles 89 and 91 of the Statute, and if the circumstances so require, to prepare and transmit a request for provisional arrest in accordance with article 92 of the Statute;

FURTHER DIRECTS the Registrar, pursuant to article 89(3) of the Statute, to prepare and transmit to any State any request for transit which may be necessary for the surrender of Omar Al Bashir to the Court;

ORDERS the Prosecution to transmit to the Chamber and to the Registry, as far as its confidentiality obligations allow, all information available to the Prosecution that may assist in averting any risks to victims or witnesses associated with the transmission of the above-mentioned cooperation request;

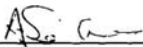
INVITES the Prosecution to transmit to the Chamber and to the Registry, as far as its confidentiality obligations allow, all information available to it that, in its view, would facilitate the transmission and execution of the above-mentioned cooperation request;

RECALLS that:

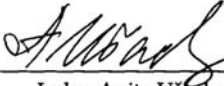

- i. the obligations of the Government of Sudan, pursuant to United Nations Security Council Resolution 1593, to cooperate fully with and provide any necessary assistance to the Court, prevail over any other obligations that the State of Sudan may have undertaken pursuant to “any other international agreement”; and that
- ii. if the Government of Sudan continues to fail to comply with the above-mentioned cooperation obligations with the Court, the competent Chamber, pursuant to article 87(7) of the Statute, “may make a finding to that effect” and decide to “refer the matter [. . .] to the Security Council” to take appropriate measures pursuant to the United Nations Charter.

FURTHER RECALLS that, in the dispositive part of Resolution 1593, the United Nations Security Council has expressly urged all States other than Sudan, as well as regional and international organisations, to cooperate “fully” with the Court.

Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge

Judge Anita Ušacka Judge Sylvia Steiner

Dated this Wednesday 4 March 2009

At The Hague, The Netherlands

SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE ANITA USACKA

I. INTRODUCTION

1. I agree with my colleagues as to the outcome of the decision, as I am satisfied that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for war crimes and crimes against humanity, and that a warrant should be issued for his arrest. I disagree with the Majority, however, as I am satisfied that there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent and is criminally responsible for genocide.
2. This difference results from a divergence of opinion regarding
 - i. whether the Prosecution must demonstrate, in order to establish reasonable grounds, that the only reasonable inference available on the evidence is that of genocidal intent, and;
 - ii. the conclusions drawn from the analysis of the evidence presented. Since my divergent perspective on these issues also has implications for other aspects of the decision, including the sections on crimes against humanity and mode of liability, I will explain such effects in separate reasoning included in the following partly dissenting opinion.
3. In order to reach a conclusion regarding the existence of reasonable grounds, the Chamber has looked to the findings and jurisprudence of other legal and quasi-legal bodies which have previously considered allegations of genocide. In my view, however, since there are substantial differences between the mandate of the Pre-Trial Chamber with regard to the present Application and the mandates of these other institutions, I also consider it important to appreciate the implications of such differences in determining the relevance of their findings and jurisprudence to the matter presently before the Chamber.
4. For example, since the International Court of Justice adjudicates only interstate disputes,¹ its examination of genocide in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* was framed by the matter of state responsibility.² In contrast, not only does

¹ Article 34 of the ICJ Statute.

² See generally *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007.

the Statute provide solely for the criminal responsibility of natural persons,³ but a proposal to include responsibility for legal persons, including states and corporations, was explicitly rejected during the drafting process.⁴

5. The UN Commission of Inquiry (UNCOI), which was tasked with (i) conducting a fact-finding mission in order to establish whether alleged violations of international humanitarian law and human rights law committed in Darfur amounted to genocide and (ii) identifying the perpetrators of such violations,⁵ examined alleged violations only between February 2003 and mid-January 2005,⁶ and made conclusions regarding the responsibility of the GoS. Upon an independent review of the facts and the receipt of additional evidence, however, the Application filed by the Prosecution covers a longer time period, from March 2003 to 14 July 2008, and focuses on the individual responsibility of Omar Al Bashir.
6. Thus, the factual findings of such bodies may be directly relevant to the Chamber's inquiry at this stage, such as where the Prosecution has referred to the UNCOI report as evidence, for example. In contrast, the factual characterisations or legal conclusions of such bodies are drawn from their different mandates, and therefore may be relevant only by analogy.⁷ As another Chamber has previously acknowledged, even the jurisprudence of the ICTY and ICTR (the "*ad hoc* tribunals"), which are also vested with the competence to adjudicate individual criminal responsibility for violations of international criminal law, is not directly applicable before this Court without "detailed analysis," because of significant differences between the procedural frameworks of this Court and the *ad hoc* tribunals.⁸ However, for the crime of genocide in

³ Article 25(1) of the Statute.

⁴ Ambos, K., *Article 25' Individual Criminal Responsibility in Commentary on the Rome Statute of the International Criminal Court*, (Triffterer, O . . . ed.), Munich, Verlag C.H. Beck oHG, 2008, p. 746. For this reason, and as I explain below, I disagree with the Majority's assertion that it is necessary to assess the genocidal intent of the GoS instead of the individual intent of Omar Al Bashir himself. Majority Decision, para. 151. If there are reasonable grounds to believe that Omar Al Bashir shared control over the "apparatus" of the Sudanese state, it would still not be proper to analyse the intent of the government as an entity, rather than the intent of the individual members of the common plan. Accordingly, since I am satisfied that there are reasonable grounds to believe that Al Bashir is criminally responsible under article 25(3)(a) as an indirect perpetrator, I would limit my analysis of the mode of liability to this question.

⁵ UN Security Council Resolution, S/RES/1564 (2004) § 12.

⁶ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at para. 11.

⁷ For example, in connection with legal proceedings regarding the disintegration of the former Yugoslavia, other courts have analysed the relevance of evidence of forced displacement to an allegation of genocidal intent. It must be observed, however, that forced displacement into Bosnian terrain may have different consequences for the displaced persons than forced displacement into Darfuri terrain. Thus, in different contexts, the same action may support different inferences. See discussion at part III.D.iii. *infra*. See also Straus, S., *The Order of Genocide*, Ithaca, Cornell University Press, 2006 at p. 7 (describing the context of the genocide in Rwanda, including the density of state institutions at the local level, the commonality of civilian mobilisation, and the resonance of the idea of state power).

⁸ *The Prosecutor v Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049. 30 November 2007, para. 44.

particular, the substantive jurisprudence of these tribunals may be instructive, since, like the Statute, the genocide provisions of the *ad hoc* tribunal statutes are based on the *Convention on the Prevention and Punishment of the Crime of Genocide* ("Genocide Convention").⁹ I have therefore found it useful to examine the ways in which such tribunals have considered various types of evidence in connection with allegations of genocide.

II. The evidentiary thresholds applicable at different stages of the proceedings under the Statute

7. The framework established by the Statute provides for three distinct stages at which the Pre-Trial and Trial Chambers examine and review the evidence presented by the Prosecution to determine whether there is sufficient evidence to justify (i) the issuance of a warrant of arrest or summons to appear under article 58 of the Statute; (ii) the confirmation of the charges and committal of a person for trial under article 61 of the Statute; and (iii) the conviction of an accused person under article 66 of the Statute.
8. The Statute proscribes progressively higher evidentiary thresholds which must be met at each stage of the proceedings.¹⁰ At the arrest warrant/summons stage, the Pre-Trial Chamber need only be "satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."¹¹ In contrast, when deciding whether or not to confirm the charges, the Chamber must determine whether there is "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged."¹² Finally, the Trial Chamber must "be convinced of the guilt of the accused beyond a reasonable doubt" in order to convict an accused.¹³
9. At each stage, of course, there may be different views regarding the sufficiency of evidence required to reach the requisite threshold.¹⁴ Yet, this Chamber has previously likened the "reasonable grounds" standard under article 58 of the

⁹ Compare article 6 of the Statute with article 6 of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Statute, UN Doc. S/25704, annex (1993), reprinted in 32 I.L.M. 1192 (1993) and with article 2 of the Statute of the International Criminal Tribunal for Rwanda, in S.C. Res. 955, U.N. Doc S/RES/955 (July 1, 1994); see also Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entered into force on 12 January 1951.

¹⁰ Compare articles 58(l)(a), 61(7) and 66(3) of the Statute. Further, at the confirmation of the charges stage, the Prosecution may rely on documentary or summary evidence and "need not call the witnesses expected to testify at trial." See article 61(5) of the Statute.

¹¹ Article 58(l)(a) of the Statute.

¹² Article 61(7) of the Statute.

¹³ Article 66(3) of the Statute.

¹⁴ See, e.g. *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, p. 1-217; compare *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Partly Dissenting Opinion of Judge Anita Uaacka, Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, p. 217-227.

Statute to the “reasonable suspicion” standard applied by the European Court of Human Rights,¹⁵ which has elaborated on that standard as follows:

With regard to the level of “suspicion,” the Court would note firstly that . . . sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) does not presuppose that the [investigating authorities] should have obtained sufficient evidence to bring charges, either at the point of arrest or while [the arrested person is] in custody. Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others” (loc. cit., p. 29, para. 53). The object of questioning during detention under sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, *facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge*, which comes at the next stage of the process of criminal investigation.¹⁶ Applying this principle in the context of the Statute, it is clear to me that the terms of article 58 of the Statute should be construed in a manner which is consistent with the fact that the Prosecution must meet an increasingly demanding evidentiary threshold at each stage of the proceedings. In other words, when presenting evidence to support the issuance of a warrant of arrest, the Prosecution should not be required to meet an evidentiary threshold which would be also sufficient to support a conclusion beyond a reasonable doubt at trial.

10. As the procedural framework is substantially different at the *ad hoc* tribunals,¹⁷ most of the tribunals’ existing public jurisprudence is drawn from the trial and appellate stages. Thus, the fact that the Pre-Trial Chamber is currently tasked with determining whether to issue an arrest warrant rather than whether to confirm the charges or convict an accused means that the evidentiary threshold espoused in these decisions is not directly applicable to the Chamber’s present analysis.
11. On this basis, I will analyse the evidence presented in relation to counts 1, 2 and 3 of the Prosecutor’s Application.

III. Counts 1, 2 and 3: Genocide

12. The Prosecution alleges that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 6 of the Statute for three counts of genocide:
 - i. Genocide by killing under article 6(a) of the Statute;

¹⁵ *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, ICC-01/04-01/06-8-Corr, para. 12.

¹⁶ European Court of Human Rights, *Murray v United Kingdom*, 28 October 1994, para. 55 (emphasis added).

¹⁷ See, e.g. ICTY Rules of Procedure and Evidence, IT/32/Rev. 42, Rule 47 (Submission of Indictment by the Prosecutor); ICTR Rules of Procedure and Evidence, Rule 47 (Submission of Indictment by the Prosecutor).

- ii. Genocide by causing serious bodily or mental harm under article 6(b) of the Statute; and
 - iii. Genocide by deliberately inflicting conditions of life calculated to bring about the destruction of the group under article 6(c) of the Statute.¹⁸
13. According to the Elements of Crimes, each of these counts shares three common elements. The first, a “contextual” element, requires the Prosecution to establish reasonable grounds to believe that the genocidal conduct occurred “in the context of a manifest pattern of similar conduct” directed against a protected group, or that the conduct “could itself effect such destruction [of the group].”¹⁹ The second common element requires the Prosecution to provide reasonable grounds to believe that the victims were members of a “particular national, ethnical, racial or religious group.”²⁰
14. Third, each count requires the Prosecution, at the arrest warrant stage, to provide sufficient evidence for the Chamber to be satisfied that there are reasonable grounds to believe that the perpetrator, Omar Al Bashir, “intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.”²¹
15. Accordingly, I will first consider the question of whether there are reasonable grounds to believe that each of the common elements is met, before turning to the issue of whether there is sufficient evidence to establish reasonable grounds of belief in relation to the *actus reus* associated with each count.

A. The common element of a manifest pattern of similar conduct

16. As the Majority acknowledges, there is a divergence of opinion concerning whether or not this contextual element is consistent with the Statutory definition of genocide,²² as required by article 9(3) of the Statute. For the reasons outlined below, in my view, this question need not be settled by the Chamber at the instant stage.
17. First, I disagree with the Majority’s contention that “the Elements of Crimes and the Rules *must* be applied unless the competent Chamber finds an

¹⁸ ICC-02/05-151-US-Exp-Corr-Anx2 (“Prosecution Application”), para. 62. According to the Majority, the Prosecution should have articulated the counts differently, so as to allege one count of genocide against the Fur, one count of genocide against the Masalit, and one count of genocide against the Zaghawa. I note, however, that no legal authority is cited in support of this proposition, and that taking such an approach would require proof of multiple *actus rei* within the same count. Alternatively, it could be possible for the Prosecution to allege nine counts of genocide, one for each *actus reus*, against the Fur, Masalit and Zaghawa. However, for reasons I will explain subsequently, I consider this approach unnecessary. See section III.B. *infra*.

¹⁹ Elements of Crimes, Articles 6(a)(4), 6(b)(4) and 6(c)(5).

²⁰ Elements of Crimes, Articles 6(a)(2), 6(b)(2) and 6(c)(2).

²¹ Elements of Crimes, Articles 6(a)(3), 6(b)(3) and 6(c)(3).

²² Majority Decision, para. 125 (citing Cryer, R. Friman. H., Robinson, D. and Wilmschurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 177–179).

irreconcilable contradiction between these documents, and the Statute on the other hand.”²³ Although article 21(1) of the Statute states that “[t]he Court *shall* apply . . . in the first place, this Statute, Elements of Crimes and its rules of Procedure and Evidence,” I note that the introduction to the Elements of Crimes states that “the following Elements of Crimes *shall* assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute.”²⁴ Indeed, several commentators have stated that the Elements of Crimes are not binding upon the Court.²⁵

18. Moreover, in my view, article 22(2) of the Statute is not a convincing justification for the application of the contextual element, as this provision refers to the definition of the crime. The legal definitions of the crimes are espoused in the Statute alone. Since article 9(3) of the Statute requires that the Elements of Crimes be consistent with the Statute, it can be inferred that only the Statute outlines the operative definition of the crime. Again, I recall that the introduction to the Elements of Crimes state only that the Elements of Crimes “shall assist” the Court in the interpretation of the Statute.
19. Even if the application of the contextual element were required, however, it has been met in the instant case, in my view. In accordance with the *Vienna Convention on the Law of Treaties*, I consider that the plain meaning of the term “manifest pattern” refers to a systematic, clear pattern of conduct in which the alleged genocidal conduct occurs.²⁶ This interpretation is also consistent with the second introductory element of article 6 of the Statute, which states that the term “manifest” is an objective qualification.²⁷
20. Recalling the findings of the Chamber regarding the existence of reasonable grounds to believe that there was a widespread and systematic attack

²³ Majority Decision, para. 128 (emphasis added).

²⁴ General Introduction (1), Elements of Crimes (emphasis added).

²⁵ Von Hebel, H., *The Making of the Elements of Crimes in The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence* (Lee, R., ed), Transnational Publishers, 2001, p. 8. “It has sometimes been argued that, because of the use of the word ‘shall,’ the instrument has a binding effect. In light of the negotiating history, this argument is not tenable. Throughout the negotiations, there was never a Majority in favour of binding elements. Only by formulating article 9 as it now stands, specifying that the instrument is only of assistance to the Court and has to be consistent with the Statute, did the inclusion of a provision on the Elements of Crimes become acceptable to all delegations.” *Ibid* See also Triffterer, O., *Can the “Elements of Crimes” narrow or broaden responsibility for criminal behaviour defined in the Rome Statute?* in *The Emerging Practice of the International Criminal Court* (Stahn, C. and Sluiter, G., eds.), Koninklijke Brill Publishers, 2009, p. 387.

²⁶ In this respect, I disagree with the meaning given to the term by the Majority, which interprets it to mean that “the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof.” Majority Decision, at para. 124. In my view, this interpretation converts the term into a “result-based” requirement, which would then duplicate the purpose of the second part of the sentence, “or was conduct that could itself effect such destruction.” See Oosterveld, V., *The Context of Genocide in The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Lee, R., ed.). Transnational Publishers, 2001, p. 46.

²⁷ Elements of Crimes, Article 6, Introduction.

on members of the Fur, Masalit and Zaghawa population, I consider that this element is met in the instant case, regardless of whether or not it should be applied.²⁸ Accordingly, I would decline to settle the question of whether or not the contextual element is consistent with the statutory definition of genocide at the present stage, as it need not be addressed here.

B. The common element of the existence of a protected group under article 6 of the Statute

21. Article 6 of the Statute, which is consistent with the Genocide Convention in this regard,²⁹ extends protection only to national, ethnical, racial or religious groups.³⁰ I therefore consider it necessary to define the contours of the protected group before analysing whether there are reasonable grounds to believe that the elements of the crime of genocide have been committed.
22. In the context of war crimes and crimes against humanity, the Majority refers to a group which it defines as “that part of the civilian population of Darfur—belonging largely to the Fur, Masalit and Zaghawa groups—perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur.”³¹ Upon an examination of the evidence, however, I do not see any indication that the GoS targeted only a part of the Fur, Masalit and Zaghawa population which was perceived by the GoS as being close to the rebel groups. Rather, the Prosecution submits evidence demonstrating that the Fur, Masalit and Zaghawa were targeted,³² as well as evidence tending to show that the Fur, Masalit and Zaghawa were accused of being rebels, despite a lack of evidence proving such support or membership.³³ One witness transcript even provides reasonable grounds to believe that the so-called “Zurga” were targeted outright:

[QUESTION] . . . did he [REDACTED] tell you, ‘You have to fight the rebels’ or did he tell you, ‘You have to fight . . . uhm . . . whoever’? . . . [ANSWER] Uh . . . no.

²⁸ Majority Decision, paras. 88–89.

²⁹ Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entered into force on 12 January 1951.

³⁰ Article 6 of the Statute. *Cf* the crime of persecution under article 7(1)(h) of the Statute, which—in addition to protecting national, ethnical, racial, and religious groups—also protects groups defined by political, cultural and gender characteristics, as well as by “other grounds that are universally recognized as impermissible under international law.”

³¹ See e.g. Majority Decision, at paras. 76, 83 and 109.

³² See evidence cited in notes 132–134, *infra*.

³³ Witness Statement, DAR-OTP-0097-0619 (Anx 21) at 0624 at para. 21 (“In April 2003, the President, Al-Bashir, went to AL FASHER and publicly gave orders to the military to eliminate the opposition and leave no survivors. . . They did not attack the opposition or rebels even though they knew where they were. These rebel bases were well-known to people in the area and the Government. They only attacked civilian villages which could not inflict damage to the military.”); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at para. 245; Physicians for Human Rights Report, 2006, DAR-OTP-0119-0635 (Anx J44) at 0644, 0688; *See also* UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0161 at para. 631 (“Even assuming that

What he said is I do not want any, one single village for the Zurgas in Darfur.³⁴ Thus, for me, there are reasonable grounds to believe that the Fur, Masalit and Zaghawa population itself was targeted as the result of a perception of an affiliation between the Fur, Masalit and Zaghawa and the rebel groups.

23. In connection with the allegations regarding genocide, the Prosecution claims that three different groups have been targeted: the Fur, the Masalit and the Zaghawa.³⁵ According to the jurisprudence of the *ad hoc* tribunals, the existence of an ethnic group must be assessed on a case-by-case basis using both subjective criteria, such as the stigmatisation of the group by the perpetrators,³⁶ as well as objective criteria, such as “the particulars of a given social or historical context.”³⁷
24. Although the Fur, Masalit and Zaghawa do differ from each other, according to the Prosecution, the Fur, Masalit and Zaghawa have historically challenged “their political and economic marginalization by successive regimes in Khartoum.”³⁸ Additionally, the Fur, Masalit and Zaghawa have each maintained separate tribal structures in order to oversee relations with other groups. Historically, these structures have also administered tribal land through a land grant system,³⁹ which has in turn influenced the development of social structures.⁴⁰ Finally, the Fur, Masalit and Zaghawa each speak their own language, in addition to Arabic.⁴¹
25. Various pieces of evidence presented by the Prosecution suggest that these populations are perceived and targeted as a unitary—though diverse—entity of “African tribes,” even though neither the perceived entity nor the Fur, Masalit or Zaghawa are, in fact, racially distinct from the perceived “Arab” tribes. For example, the derogatory epithets reported by witnesses, including

in all the villages they attacked there were rebels present, or at least some rebels were hiding there, or that there were persons supporting rebels—a fact that the Commission has been unable to verify for lack of reliable evidence - the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack.”) (emphasis added).

³⁴ Witness Transcript, DAR-OTP-0147-0071 (Anx B4) at 0114. lines 1457–1463.

³⁵ Prosecution Application, para. 77.

³⁶ ICTY, *Prosecutor v Brdanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 684; see also ICTY, *Prosecutor v Blagojevic*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, para. 667; ICTR, *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, para. 254.

³⁷ ICTR, *Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 317.

³⁸ Prosecution Application, para. 79.

³⁹ See, eg. Witness Statement, DAR-OTP-0095-0151 at para.14; UNCOI Report, DAR-OTP-0018-0010 at 024, para. 54.

⁴⁰ Physicians for Human Rights, Report *Darfur Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0675-0677.

⁴¹ See Prosecution Application, para. 83; UNCOI Report, DAR-OTP-0018-0010, para. 52.

the terms “Zurga,” “Nuba,” and “black,” do not distinguish between the Fur, Masalit and Zaghawa as distinct groups, but refer to a perceived unitary entity of “African tribes.”⁴² Similarly, various reports describe how persons most affected by a perceived African-Arab polarization “have come to perceive themselves as either ‘African’ or ‘Arab’.”⁴³

26. Accordingly, my view of the target of the counter-insurgency campaign differs from the Majority’s. I also disagree with the Majority’s analysis of the protected group in connection with genocide. I would define the protected group—and the target of the counter-insurgency campaign—as a single ethnic group of the “African tribes,”⁴⁴ which is in turn comprised of smaller groups, including the Fur, Masalit and Zaghawa.⁴⁵

C. *Mens Rea* under article 6 of the Statute

i. *The legal element of genocidal mens rea and the requisite evidentiary threshold at the arrest warrant stage*

27. It is well-recognised that the lack of direct evidence or explicit manifestations of intent by the perpetrator renders the establishment of the *dolus specialis* of genocide particularly difficult.⁴⁶ Since a well-disguised intent should not be a barrier to prosecution or to conviction, other international tribunals assigning individual responsibility for the crime of genocide have held it permissible to infer the existence of genocidal intent from a variety of indicia.⁴⁷

⁴² See, e.g. Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0065 at para. 21 (“When the attackers got closer to the town, they started killing people and set fire to the huts. I heard them shouting ‘Nuba nuba’ or ‘black’ as they attacked the town. *I heard them say, in Arabic, that they did not want any black person to survive.*”) (emphasis added); Witness Statement, DAR-OTP-0148-0110 at 0123, para. 60 (“The abductors called them *zurga*.”); UNCOI Report, DAR-OTP-0018-0010 at 0133, para. 511.

⁴³ UNCOI Report, DAR-OTP-0018-0010 at 0133, para. 510. See also *ibid*, paras. 60 and 511. See also Amnesty International, Sudan: Darfur: “Too Many People Killed for No Reason,” DAR-OTP-002-0067 at 0078 (“The attackers portray themselves as “Arabs, the civilians being attacked are called “Blacks” or even “slaves.” At the same time, the Zaghawa and the Fur claim that these are attempts to drive all “Africans” away from Darfur.”).

⁴⁴ In this respect, see UNCOI Report, DAR-OTP-0018-0010 at 0133, para. 512 (“it may be considered that the tribes who were the victims of attacks and killings subjectively make up a protected group”) (emphasis added).

⁴⁵ I would stress, however, that this term is not intended to connote a racial distinction between the ethnic “Africans” and the ethnic “Arabs.”

⁴⁶ See e.g., ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1, Trial Judgment, 21 May 1999, para. 93; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Appeals Judgment, 26 May 2003, para. 525.

⁴⁷ ICTY, *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 970; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Appeals Judgment, 26 May 2003, para. 525; ICTY, *Prosecutor v. Sikirica et al*, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, 3 September 2001, para. 46.

28. It is imperative to note, however, that the trial judgments of the *ad hoc* tribunals, require a chamber to conclude—beyond a reasonable doubt—that a perpetrator possessed genocidal intent and therefore an inference must be “the only reasonable [one] available on the evidence.”⁴⁸ The Majority suggests (i) that the Prosecution states in its Application that this threshold is applicable at the instant stage,⁴⁹ and (ii) that such threshold is properly applicable to the Prosecution’s burden to establish reasonable grounds in connection with article 58 of the Statute.⁵⁰ I disagree with both assertions.
29. The Prosecution does not suggest that the application of this standard would be appropriate at this stage. In particular, I note the text of footnote 506 of the Prosecution’s Application, which states in part,

[w]hile this is the evidentiary standard required for proof beyond reasonable doubt, the Prosecution notes that for the purposes of an Art. 58 application the lower standard of reasonable grounds will instead be applicable. I therefore consider that Prosecution’s statement in the first sentence of paragraph 366 is in fact a restatement of the law applicable at the trial stage under *ad hoc* tribunal jurisprudence. I read the second sentence of paragraph 366 as a submission with respect to the Prosecution’s case as a whole, rather than with respect to the Application itself.⁵¹

30. Regardless, in my view, even if the Prosecution had suggested that this threshold was applicable at the arrest warrant stage, such a submission would not be binding on the Chamber. For the reasons set out below, I do not consider its application appropriate.
31. Firstly, I note that the trial chambers of the *ad hoc* tribunals have applied this threshold in relation to their conclusions at trial, at which point, rather than being satisfied that there are reasonable grounds, a chamber must be satisfied beyond a reasonable doubt.⁵² Yet, a recent decision of the ICTR Appeals Chamber explains the link between this evidentiary threshold and the burden of proof at trial:

It is well established that a *conclusion of guilt* can be inferred from circumstantial evidence only if it is the only reasonable conclusion available from the evidence.

⁴⁸ ICTY, *Prosecutor v Brdanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 970.

⁴⁹ Majority Decision, para. 158.

⁵⁰ Majority Decision, para. 159.

⁵¹ The Prosecution states at para. 366 of its Application, “In the instant case, the Prosecution respectfully submits that AL BASHIR’s intent to destroy the target groups as such in substantial part is the only available inference from a comprehensive consideration of nine factors. . . .”

⁵² Indeed, the *ad hoc* tribunal jurisprudence cited by the Majority in support in this regard consists of judgments made at the trial and appellate stages. Majority Decision at para. 160 (citing, *inter alia*, ICTY, *The Prosecutor v Static*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 53–57; ICTY, *The Prosecutor v Vasiljevic*, Case No IT-98-32-A, Appeals Judgment, 25 February 2004, paras. 120, and 128; and ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, para. 333.).

Whether a Trial Chamber infers the existence of a particular fact upon which the guilt of the accused depends from direct or circumstantial evidence, *it must reach such a conclusion beyond a reasonable doubt*. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion of *guilt beyond a reasonable doubt* cannot be drawn.⁵³ Thus, in my view, requiring the Prosecution to establish that genocidal intent is the only reasonable inference available on the evidence is tantamount to requiring the Prosecution to present sufficient evidence to allow the Chamber to be convinced of genocidal intent beyond a reasonable doubt, a threshold which is not applicable at this stage, according to article 58 of the Statute.

32. It is, clear to me, however, that when the Prosecution alleges that the evidence submitted supports an inference of genocidal intent, in order for there to be reasonable grounds to believe that such an allegation is true, the inference must indeed be a reasonable one. Yet, in light of the differing evidentiary burdens at different phases of the proceedings, the Prosecution need not demonstrate that such an inference is the *only* reasonable one at the arrest warrant stage.
33. When several reasonable inferences may be drawn from the evidence, at the arrest warrant stage, the Prosecution need not prove whether there are substantial grounds, as would be necessary if the article 58 standard was equivalent to the standard of article 61(7) of the Statute. Nor must the Prosecution prove an allegation beyond a reasonable doubt, as would be required at trial under article 66(3) of the Statute. All that is required in order to obtain an arrest warrant is for the Prosecution to establish reasonable grounds to believe that an allegation is true.
34. Thus, once sufficient evidence is presented to render an inference of genocidal intent reasonable, one can be satisfied that there are reasonable grounds to believe that genocidal intent exists, unless evidence is also presented which would render an inference of genocidal intent unreasonable. Applying this lower evidentiary threshold is, in my view, consistent with the preliminary nature of the proceedings at the arrest warrant stage, as well as with article 22(2) of the Statute, which pertains to the definition of a crime rather than to the applicable evidentiary threshold at a given stage of the proceedings.
35. Having set out the applicable standard above, I shall now consider whether the evidence presented meets this standard.

ii. Evaluation of the evidence

36. Although *ad hoc* tribunal jurisprudence is by no means binding on this Court,⁵⁴ and despite the difference between the evidentiary threshold applicable at the

⁵³ ICTR, *Prosecutor v Karera*, Case No. 1CTR-01-74-A, Appeals Judgment, 2 February 2009, para. 34 (emphasis added).

⁵⁴ See, eg *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, para. 45.

arrest warrant stage and that which must be met at trial, the types of evidence considered by *ad hoc* tribunal trial chambers may nevertheless be useful insofar as they indicate the types of evidence deemed relevant to the conclusions ultimately drawn at the trial stage. In particular, *ad hoc* tribunal trial chambers have used specific types of evidence in the manner described below to support conclusions that (i) an Accused possessed an *intent*, (ii) that intent consisted of the intent to *destroy* (iii) the intent was to destroy *a group or a substantial part thereof* and (iv) the intent to destroy a group consisted of the intent to destroy the group *as such* (as distinguished from an intent to destroy a group of individuals within the group or substantial part thereof). I will examine each of these different types in turn before considering some examples of evidence submitted by the Prosecution in support of its Application. I highlight, however, that the list of evidentiary examples provided below is not intended to be exhaustive.

a) The existence of intent

1) Evidence emanating from or relating to the Accused

37. Various forms of communication, including discrete words and utterances by the Accused,⁵⁵ statements of the Accused,⁵⁶ and evidence tending to show that the Accused ordered attacks on the target group, are relevant to show the possible formation of intent.⁵⁷
38. The Prosecution submits, *inter alia*, the following evidence relating to statements by Omar Al Bashir and/or evidence that Omar Al Bashir ordered attacks. Additional evidence corroborates these examples.⁵⁸ One witness reported that

⁵⁵ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-A, Appeals Judgment, 1 June 2001, para. 148; ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93 and 542; ICTY, *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 75; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 496; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, paras. 252–3.

⁵⁶ ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgment, 7 June 2001, para. 63; ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 728

⁵⁷ ICTR, *Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 429; ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 542; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Judgment, 6 December 1999, para. 399; ICTR, *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment 17 June 2004, para. 259.

⁵⁸ Witness Statement, DAR-OTP-0128-0042 (Anx J86) at 0078 at para. 242 (“I was asked if there were orders to refrain from illegal acts during an attack: No, in fact, the govt. sends some signals about what they want to happen during attacks. As an example, the President gave a speech at Al Fashir where he said that he does not recognize the concept of injured persons or prisoners. I understood this to mean that the fighting forces could do what they wanted with injured persons and they should not carry out arrests.”); Witness Statement, DAR-OTP-0133-0573 (Anx J81) at 0607 at para. 130 (“The president added that he had asked HARUN to remain in Darfur to implement his orders. HARUN also made a public statement saying he performed his function based on what he was told to do as a public officer.”).

In April 2003, the President, Al-Bashir, went to AL FASHER and publicly gave orders to the military to eliminate the opposition and leave no survivors. . . . Having received orders from their chief, the military then went to African villages and left nothing behind. Together with the Janjaweed, they burned houses, killed small children and raped girls. They did not attack the opposition or rebels even though they knew where they were. These rebel bases were well-known to people in the area and the Government. They only attacked civilian villages which could not inflict damage to the military.⁵⁹ Another witness related,

I personally heard BASHIR say at the meeting words to the effect of: 'I have given instruction to the army to quell the rebellion and not to bring any prisoners or wounded'.⁶⁰ According to another witness,

The shurta and the army in Darfur were not fighting the opposition fighters but they would attack villages, kill innocent people, children and the elderly, and burn the villages. President AL-BASHIR said on national television that he gave the military a *carte blanche* (in Arabic "atlakto yad al-jaysh") in Darfur not to take *asra* (war prisoners) or inflict injuries. I interpreted this to mean that the President instructed his military to kill and destroy without restraint.⁶¹

39. Evidence of the Accused's position of power or authority can be relevant to support an inference that an accused not only knew of a genocidal plan, but also that he or she shared the genocidal intent of the members of the plan.⁶² I therefore consider the evidence of Omar Al Bashir's power and authority to be relevant in this connection as well.⁶³

2) Evidence relating to others

40. The words and deeds of others acting with or at the behest of the Accused can also be relevant to support an inference of the formation of intent as well. For example, evidence that during attacks led by an accused against the targeted group "the attackers were chanting 'Tuba Tsembe Tsembe', which means 'Let's exterminate them', a reference to the Tutsi" has been held to support an inference of genocidal intent.⁶⁴
41. The Prosecution submits—*inter alia*⁶⁵—the following witness statements relating the words and/or deeds of others acting with or at the behest of Omar Al Bashir:

When [Harun's] time came, he stated that for the sake of Darfur, *they were ready to kill 3/4 of the people in Darfur, so that Vt could live*. . . . We understood from what

⁵⁹ Witness Statement, DAR-OTP-0097-0619 (Anx 28) at para. 21.

⁶⁰ Witness Statement DAR-OTP-0100-0075 (Anx 31) at 0087- 0088 at para. 52.

⁶¹ Witness Statement, DAR-OTP-0107-0473 (Anx J88) at 0480-0481 at para. 32.

⁶² *icty, Prosecutor v. S Milosevic*, Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T, 16 June 2004, para. 288.

⁶³ *See, e.g.* evidence cited at footnote 249 of Majority Decision.

⁶⁴ ICTR, *Prosecutor v Niyitegeka*, Case No. ICTR-96-14-T, Trial Judgment, 16 May 2003, paras. 413 and 419.

⁶⁵ *See also* Witness Statement, DAR-OTP-0107-0781 (Anx J16) at 0784 at para. 12 (" . . . [T]he attackers would say 'Kill them, burn them' and scream and shout. They would curse and swear at them saying 'these are animals, these are ignorant, kill them!' They would also say

he said that the $\frac{3}{4}$ signified that the Fur, Zaghawa and Masalit were going to be targeted by him.⁶⁶

During both attacks the Janjaweed insulted us and called us several names. They said that we were the wives and *mothers of Toro Bora [rebels] and called us black Nubas*. . . . During the second attack I remember the Janjaweed saying that they will wipe us out, and that we are of no benefit to them. . . . *They said dearly that they had permission from the government so as to wipe us out, to kill us, to chase us away, and that we women who were there were their wives.*⁶⁷

The fursan said they were sent and ordered not to leave any Nuba. . . . *They also told the men that they were sent to kill every black thing except the Laloba and Daylabc trees which are also black.* . . . ⁶⁸Quoting a secret memorandum allegedly circulated within the National Islamic Front, a book excerpt submitted by the Prosecution explained,

*' . . . the Islamic Movement has overlooked this tribe and worked towards strengthening other tribes in the spirit of dividing up the elements that make up the Sultanate of Darfur (the Fur, Tanjur and others). The Islamic Movement will not be appeased so long as this tribe [the Fur] is not undermined or exterminated, so that the western front remains safe.'*⁶⁹

3) Contextual evidence

i) Plans, policies and preparation

42. Although the existence of a genocidal plan or policy has not been considered a legal element of the crime of genocide under *ad hoc* tribunal jurisprudence, proof of such a plan or policy has been deemed relevant to the formation of intent.⁷⁰ A Chamber may infer the existence of such a plan or policy from a variety of indicia. Proof of governmental involvement in attacks,⁷¹ through

'clean them from the country, they are like dirt.' . . .'); Witness Statement, DAR-OTP-0088-0150 (Anx H, line 48) at 0158 at paras. 45–46 ([After describing rape attack] "Those who abducted us told us that "Ibna kelb, al arat ma-hagatkum which in Arabic means "little dog, this land is not for you" . . .').

⁶⁶ Witness Statement, DAR-OTP-0095-0049 (Anx 25) at 0076- 0077 at para. 128 (emphasis added).

⁶⁷ Witness Statement, DAR-OTP-0088-0187 (Anx 20) at para. 47 (emphasis added).

⁶⁸ Witness Statement, DAR-OTP-0088- 0219 (Anx 21) at 0230 at paras. 65–66 (emphasis added).

⁶⁹ Book: Darfur Dotting The 'i's And Crossing The 't's by Professor Sulayman Hamid Al Hajj, DAR- OTP-0150-0105 (Anx 82) at 0118 (emphasis added).

⁷⁰ ICTY, *Prosecutor v Jelusic*, Case No. IT-95-10-A, Appeals Judgment, 5 July 2001, para. 48; see also ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 94.

⁷¹ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 309–312; ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para. 35.

the involvement of public officials or soldiers in carrying out the attacks⁷² or through the provision of transportation for the attackers⁷³ have been considered relevant in this regard.

43. The Prosecution submits a variety of different types of evidence describing the involvement of the GoS through the presence and participation of members of the Sudanese Armed Forces in attacks,⁷⁴ through the supply of arms to the Janjaweed,⁷⁵ and through the direction of discriminatory acts by a member of the Sudanese military.⁷⁶

⁷² ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 536; ICTR, *Prosecutor v Ntuyitegeka*, Case No. ICTR-96-14-T, Trial Judgment, 16 May 2003, para. 414; ICTR, *Prosecutor v Kamuhanda*, Case No. ICTR-95-54A-T, Trial Judgment, 22 January 2005, para. 644.

⁷³ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 536.

⁷⁴ Witness Statement, DAR-OTP-0084-0507 (Anx J2) at 0513 at para. 30 ("From the mountain, I could see clearly the Janjaweed with their horses and the government troops behind them. The troops started shooting, they had Doshka guns on their cars and other big weapons -I do not know the exact type. The army vehicles had yellow number plates as all army vehicles do have. I saw the soldiers shooting the people that could not manage to get right up the hill area, the elderly, the people who couldn't run. They were shooting with doshkaks and some of them had shoulder-held guns. The army had been guarding the Janjaweed from the outside of the village while the Janjaweed attacked us. From the mountain, I saw the army's uniforms and their landcruisers. Most of the cars were the same mixture of colours as the uniforms I already described.") (emphasis added); Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0065 at para. 21 ("At about 0900 hrs [on 15/08/2003], the Janjaweed and government soldiers attacked the town [Bendisi] from the east. I was in my house. All the government soldiers arrived in 7 camouflaged-coloured Toyota Land Cruisers. The trucks had 'Doshkas' mounted on them. The Janjaweed were on horseback and camelback. Some of the Janjaweed were on foot. They started firing randomly."); Witness Statement, DAR-OTP-0126-0005 (Anx 77) at para. 13 ("After the air bombing Janjaweed and soldiers entered the village. The soldiers had cars with guns on them. The Janjaweed were riding on horses and camels. The Janjaweed gathered the cattle. The soldiers shot doors open and gathered belongings like mattresses. Both Janjaweed and soldiers killed a number of people when they found them in their houses. While the Janjaweed were doing this they sang 'Hail the name of Allah, our orders came from Ali Usman TAHA.'"); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at para. 315 ("The destruction was targeted at the areas of habitation of African tribes, in particular the Fur, Zaghawa and Massalit. There was no military necessity for the destruction and devastation caused as a joint venture by the Janjaweed and the Government forces.").

⁷⁵ See, eg Witness Statement, DAR-OTP-0088-0187 (Anx 20) at 0192-0193 at paras. 20–29 ("The Janjaweed are a group of people armed by the Sudanese government comprising of Arabs, Gimir and Tama; they are not well trained. As far as I know they were trained in June and July 2003 and received their weapons from the Reserve Force.").

⁷⁶ DAR-OTP-0120-0678 (Anx H, line 818) at 0148 ("Prominent members of the Masalit community were arrested, imprisoned and tortured; Masalit civilians were disarmed, placed under curfew and restricted in their movements; Masalit youths were forcibly conscripted and sent to Southern Sudan to fight. In a three-year war, 1996–98, hundreds of civilians were killed, most of them by government-backed militias. Another 100,000 fled to Chad. . . . The atrocities were well planned, and directed by the Sudanese military governor of the area") (emphasis added).

44. Evidence tending to show that preparations for genocide, such as the mobilisation of civil defence forces or militia groups⁷⁷ and the distribution of weapons to civilians,⁷⁸ would also support an inference that a genocidal plan existed.
45. The Prosecution submits numerous witness statements and other evidence which each describe the mobilisation and involvement of the civil defence forces in attacks.⁷⁹ Further, both the UNCOI Report and witness statements submitted by the Prosecution describe the distribution of arms by the GoS to the civilian Arab, Gimir and Tama population.⁸⁰
46. Additionally, indicia such as (i) the existence of execution lists targeting the protected group; (ii) the dissemination of extremist ideology; and (iii) the screening and selection of victims on the basis of their membership in the protected group may also be relevant to show the formation of intent.⁸¹ Moreover, the existence of a plan or project to create an ethnically homogenous state,

⁷⁷ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 283, 284.

⁷⁸ ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 298.

⁷⁹ Witness Statement, DAR-OTP-0119-0711 (Anx 66) at 0714-0721 at para. 15; Witness Statement, DAR-OTP-0097-0639 (Anx 29) at 0643- 0645 at para. 19; Investigator's Notes, DAR-OTP-0014-0213 (Anx 14) at 0213; DAR-OTP-0116-0889 (Anx 57) at 0891.

⁸⁰ Witness Statement DAR-OTP-0088-0219 (Anx 21) at para. 15 ("Soon after . . . there was a general call to receive weapons. However, when some men went to receive their weapons they were informed that the distribution is restricted to Arabs, Tama and Gimir. . . eventually, these were the people who got the weapons."); Witness Statement, DAR-OTP-0097-0328 (Anx 27) at para. 19 ("I am aware of three cases of weapons distribution in Garsila area. In the first case I observed a gathering of Arabs, Tama and Gimir, receiving their firearms from the intelligence office in 2001. . . 20. The weapons distribution started at around 9:00am and ended around 2:00pm. From my position in the market I could see the large gathering around the intelligence office of Arabs, and a few Tama and Gimir. . . There was definitely no Fur person among the gathering."); Witness Statement, DAR-OTP-0118-0002 (Anx 59) at 0026-0027 at paras. 126-127 ("Before that part of the government's work was not apparent but after calling Musa HILAL to the meeting it started freely arming, recruiting and training the Arabs and coordinating with the police. MUSTAFA told me that this meeting involved Salah GOSH, Brigadier General Omar Dafaa Al SID (Director of the Society Security) and Colonel Abbas Ali KHALIFA."); Witness Statement, DAR-OTP-0156-0164 (Anx H, line 803) at 0178 at para. 58 ("The plan of the Islamic Front is to support the Arab tribes by taking the following measures: . . . We shall arm the Arab tribes in order to make them the nucleus of the Arabic, Islamic congregation."); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at n 189 ("Epithets that eyewitnesses or victims reported to the Commission include the following: "This is your end. The Government armed me."); UNCOI Material, DAR-OTP-0011-0111 at 0018-0019 ("By the government who gave them uniforms and arms. The witness knows this because the type of uniforms and weapons are only available from the government. The Janjaweed are regarded as PDF because their uniforms and arms are distributed from the PDF Headquarters north of Nyala. There are 85 OMDA's in the Nyala region. The Arab OMDA's were invited to mobilize their tribesmen as army through the PDF. Witness was told this by Arab Omda's. (The witness opinion is that GOS believe all non-Arab Omda are rebels or rebel supporters.) The Arab Omda's attended a mobilization meeting at PDF HQ and received uniforms and arms.").

⁸¹ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-A, Appeals Judgment, 1 June 2001, para. 139.

along with evidence of an intent to exclude non-members by violence and evidence that the targeted group could not lay claim to any specific territory, has been held to support an inference that the plan contemplates the destruction of the non-member ethnic groups.⁸²

47. The Prosecution submits the following evidence which would be relevant to the existence of a plan. According to one witness,

The Government believed that the strongest rebel component was the Zaghawa tribe, and that therefore the Zaghawa tribe had to be destroyed . . . in similar fashion the Government believed that the Massalit and Fur supported the rebels and that they therefore had to be driven out of their lands. This *was a hidden agenda* which is only obvious from the effect on the ground in Darfur, as told to me by the civilian population, military colleagues and fellow detainees. . . .⁸³ Another witness recalled,

. . . the NIF issued a secret bulletin in 1992 relating to the Fur. It was entitled 'vision on the Fur for the future perspective'. After a historical introduction on the Fur the document indicated that they were to be excluded from key positions in the intelligence service, military, or the police administration and secondly, the Fur areas were to be destabilized in order to instigate the moving out of the Fur from Darfur. . . .⁸⁴ As mentioned previously, a memorandum allegedly circulated within the National Islamic Front and submitted by the Prosecution stated,

The Revolution has decided to bypass this tribe, [even though] it occupies a strategic place in dissemination the concepts of the Islamic Movement to Western and Central Africa. It also occupies an area considered to be the Movement's last line of defence in the event of its being cornered. . . . *The Movement will not feel safe until this tribe [the Fur] is contained or exterminated and the Western front made secure.* . . .⁸⁵ A book excerpt submitted by the Prosecution corroborates this report:

The document is irrefutable evidence of the insistence by the National Islamic Front to go on with the plot despite the failings it has faced in Darfur. . . . In the same document it is stated:

"For these reasons, the Islamic Movement has overlooked this tribe and worked towards strengthening other tribes in the spirit of dividing up the elements that make up the Sultanate of Darfur (the Fur, Tanjur and others'). *The Islamic Movement will not be appeased so long as this tribe is not undermined or exterminated, so that the western front remains safe.*" This is exactly what is happening in Darfur now before our very eyes: a war to completely exterminate the tribe that does not discriminate between men, women and children or the elderly or disabled. Instead, the people in the camps in Darfur and Chad, and the sick in hospitals are pursued and killed

⁸² ICTY, *Prosecutor v Karadzic*, Case No. IT-95-5/IT-18-1-R-61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94.

⁸³ Witness Statement, DAR-OTP-0125- 0665 (Anx J47) at 675 at paras. 55, 56 (emphasis added).

⁸⁴ Witness Statement, DAR-OTP-0095-0002 (Anx J95) at 0007 at para. 20.

⁸⁵ The Islamic Movement and the Fur Tribe (A secret report), DAR-OTP-0095- 0218 at 0223, English translation at DAR-OTP-0148-0101 (Anx H, line 45) at 0103- 0106.

until they have been finished off. They burn the houses and the things and people inside them, obliterate the villages, markets and farms and the people there, turning it into a wasteland devoid of any Darfuris.⁸⁶

ii) Evidence of *modus operandi*

48. The general context of the perpetration may also support an inference that the perpetrator had formulated intent. For example, where it is demonstrated that acts of a consistent character have been systematically directed against a protected group, such acts may support an inference that intent has been formulated.⁸⁷ Such evidence may include, in particular, evidence of killings perpetrated in a systematic manner,⁸⁸ evidence tending to show that types of weapons and methods employed by the attackers were consistent across attacks,⁸⁹ and evidence of a consistent *modus operandi* across attacks.⁹⁰
49. Evidence submitted by the Prosecution in relation to the contextual elements of crimes against humanity, as well as in relation to extermination, is therefore relevant here as evidence of killings perpetrated in a systematic manner.⁹¹ Additionally, the Prosecution submits witness statements which report the use of consistent types of weaponry,⁹² and are also corroborated by the UNCOI report.⁹³

⁸⁶ Book: Darfür Dotting The 'i's And Crossing The 't's by Professor Sulayman Hamid Al Hajj, DAR- OTP-0150-0105 (Anx 82) at 0108 and 0115- 0118 (emphasis added).

⁸⁷ ICTY, *Prosecutor v Jeliscic*, Case No. IT-95-10-A, Appeals Judgment, 5 July 2001, para.47; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 523; ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93, 289, 534, 535, 537; ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 496; Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations, para. 111.

⁸⁸ ICTY, *Prosecutor v Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 547. Some evidence presented in relation to this aspect may also be relevant to extermination as a crime against humanity, which requires the Prosecution to demonstrate that "the conduct constituted, or took place as part of, a mass killing of members of a civilian population." Article 7(1)(b), Elements of Crimes.

⁸⁹ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 537.

⁹⁰ ICTR, *Prosecutor v Kayishema*, Case No. 1CTR-95-1-T, Trial Judgment, 21 May 1999, para. 535: ICTY, *Prosecutor v Jeliscic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 88.

⁹¹ See Majority Decision, paras. 94 and 97; evidence cited in footnotes 111 and 115 of Majority Decision.

⁹² See, eg., Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0064-0072 at para. 21 ("All the government soldiers arrived in 7 camouflaged-coloured Toyota Land Cruisers. The trucks had 'Doshkas' mounted on them."); Witness Statement, DAR-OTP-0084- 0507 (Anx J2) at 0513 at para. 30 ("The troops started shooting, they had Doshka guns on their cars and other big weapons -I do not know the exact type.").

⁹³ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0070, 0071 at para. 253 ("Ground forces used various weapons including AK.47, G3, G4 assault rifles, RPG7, machine guns, and Doshka 12,7mm machine gun mounted on vehicles.").

50. The Prosecution further submits evidence tending to show that a consistent *modus operandi*, entailing a joint attack by the GoS and Janjaweed forces accompanied or followed by air support, was used consistently. The following accounts by witnesses are representative of other witness statements submitted as well.⁹⁴

All the government soldiers arrived in 7 camouflaged-coloured Toyota Land Cruisers. The trucks had 'Doshkas' mounted on them. The Janjaweed were on horseback and camelback. Some of the Janjaweed were on foot. They started firing randomly. At first, nobody thought it was an attack because of the message the soldiers had delivered about 'Azzakat' earlier that morning. When the attackers got closer to the town, they started killing people and set fire to the huts. . . 3 combat aircrafts also arrived and started bombing the town. There were 2 Antonovs and 1 Hercules.⁹⁵

"About an hour after hearing the shots, I saw four brown land cruisers approaching from the same direction . . . I first saw three of the four land cruisers in the market on the 14' which was a market day. . . . The land cruisers which had about 40 or 50 asakir on them stopped by the high secondary school. . . . The four land cruisers had weapons and ammunition tied around the trucks. . . . Not long after, I saw a large number of Janjaweed on camels and horses approaching from the East. There were more than 500 of them and they started shooting randomly at people inside

⁹⁴ See also Witness Statement, DAR-OTP-0084- 0507 (Anx J2) at 0513 at para. 30 ("From the mountain, I could see clearly the Janjaweed with their horses and the government troops behind them. The troops started shooting, they had Doshka guns on their cars and other big weapons -I do not know the exact type. The army vehicles had yellow number plates as all army vehicles do have. I saw the soldiers shooting the people that could not manage to get right up the hill area, the elderly, the people who couldn't run. They were shooting with doshkas and some of them had shoulder-held guns. The army had been guarding the Janjaweed from the outside of the village while the Janjaweed attacked us. From the mountain, I saw the army's uniforms and their landcruisers. Most of the cars were the same mixture of colours as the uniforms I already described."); Witness Statement, DAR-OTP-0094-0091 (Anx H, line 76) at 0100 at para. 37 ("From the mountain, I could see that Arwala was surrounded by some Janjaweed and Asakir, whilst others entered. The Asakir and Janjaweed shot at the villagers; I saw some of them running to nearby mountains and some entered into farms and sugar cane plantation. I heard the cries of people and animals. Some villagers were shot and killed and others died when they were trampled on by horses. The Janjaweed and Asakir slept in Arwala after burning it down. While the attack was taking place. I saw two white antinovs and one black helicopter from the East, circle over Arwala and then they went to the direction of Garsila; they went back, circled again and then went to the East from where they had originally come."); Witness Statement, DAR-OTP-0094-0119 (Anx J70). at paras. 60-64: On August 15, 2003, the Kodooms were attacked. . . . the Janjaweed arrived on horses and camels, accompanied by a vehicle which carried Asakir and had a Doshka mounted on it. . . . A group of Janjaweed then came to the forest and started shooting when they saw us. We escaped all the bullets. After that, I saw a vehicle with Doshka on it but could not tell whether there were Janjaweed or Asakir on board. The soldiers started shooting with the Doshka so we ran into a brook and stood under a tree which had many long branches hanging down. After shooting for a while, they left in the direction of Merly. . . .").

⁹⁵ Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0064-0072 at para. 21.

the town. . . . As this was going on I heard a loud sound like an explosion. My father told me that this was the sound of Dana and that we should run. . . . Around 1700 hrs I heard the sound of planes . . . I saw two planes approaching from the east of [REDACTED] . . . I know that they called Antinovs and it wasn't the first time they flew over [REDACTED]."⁹⁶ These descriptions are also consistent with reports by NGOs.⁹⁷

iii) Evidence of breadth and scale

51. *Ad hoc* tribunal trial chambers have also considered the breadth and scale of attacks,⁹⁸ as well as whether or not such attacks were widespread, to be relevant to an inference of the formation of intent.⁹⁹ In some instances, however, a particularly brutal attack targeting several thousand members of a group can indicate the existence of intent.¹⁰⁰ Additionally, the proportion of the group who were victims of genocidal acts may be considered in connection with the scale of the attacks.¹⁰¹
52. In addition to the evidence discussed in connection with crimes against humanity,¹⁰² the Prosecution submits additional evidence which demonstrates the breadth and scale of the attacks. For example, a witness reported that around August 2003, more than 45 villages in the Bendisi area were attacked.¹⁰³ According to one NGO report,

⁹⁶ Witness Statement DAR-OTP-0088- 0187 (Anx 20) at 0192–0197 at paras. 23–46.

⁹⁷ Human Rights Watch Report "Terbeba: twenty-six killed, DAR-OTP-0003-0099 (Anx J9) at 0121- 0122 ("The attack was done by some 300 Janjaweed on horses and camels, accompanied by four government cars—three Land Cruisers carrying soldiers and a Renault for logistics [ammunition].").

⁹⁸ ICTY, *Prosecutor v Krstic*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para.35; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, para. 258; ICTR, *Prosecutor v Kamuhanda*, Case No. ICTR-95-54A-T, Trial Judgment, 22 January 2005, para. 629.

⁹⁹ ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 730; ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, paras. 496, 498, 516; ICTR, *Prosecutor v. Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T, Trial Judgment, 21 February 2003, para. 785.

¹⁰⁰ ICTR, *Prosecutor v Nindabahizi*, Case No. ICTR-2001-71-T, Trial Judgment, 15 July 2004, para. 461. Such evidence may also demonstrate that the object of the formulated intent is the destruction of the target group. See para. 68, *infra*.

¹⁰¹ ICTY, *Prosecutor v Brdanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 974 (analysing the proportion of the group that were victims under articles 4(2)(a), 4(2)(b) and 4(2)(c) of the Statute).

¹⁰² In this regard, the evidence discussed in connection with crimes against humanity is relevant as well. See generally Majority Decision Part IV.A. 2. The evidence submitted by the Prosecution and discussed above in connection with planning is also relevant here.

¹⁰³ Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0064-0072 at para. 18. See also Amnesty International report, DAR-OTP-0002-0207 (Anx J5) at 0243 ("Reports alleged that 300 villages had been attacked or burnt to the ground in the [Kabkabiya] area.").

Since April 2003, many cases of killings targeting particularly the Fur tribes have been reported . . . in March 2004, 168 persons belonging to the Fur tribes were arrested in Zaray, Fairgo, Tairgo and Kaskildo and were summarily executed in Delaij, Wadi Salih province—in April 2004, the bombing of Mahajrea village killed four civilians, belonging to the Zakhawa tribe. Most of these killings have been accompanied by looting and burning of properties. Many cases of torture directed at member of Fur tribes have also been reported, as well as cases of arbitrary arrests. . . .¹⁰⁴ Another NGO reported,

Villagers from the Garsila area . . . woke up on March 5, 2004, to find an area encompassing thirty-two villages surrounded by government troops and Janjaweed. The government and militia forces then entered the villages and began asking men where they came from. One hundred and four individuals—most of them people who had been displaced from villages in the Zara and Kaskildo areas south-east of Deleig, in the hills, and many of them sheikhs and omdas—were taken to the government jail in Deleig. That same night, according to local people, seventy-two of the 104 were loaded into army trucks by government and militia forces, and driven two kilometers to a valley where they were executed.¹⁰⁵ As of 2005, at least 700 villages in Darfur had been completely or partially destroyed, resulting in as many as 1.65 million internally displaced persons, in addition to 200,000 refugees in Chad.¹⁰⁶

iv) Other factors

53. Other relevant “general context” factors considered by the *ad hoc* tribunal trial chambers include, *inter alia*: whether bodily injuries were extensive, whether property belonging to members of the targeted group was targeted, and whether derogatory language was used by an accused or by others against members of the target group.¹⁰⁷
54. The Prosecution submits a variety of evidence of rape as extensive bodily injury. For example, according to the UNCOI Report,

The [. . .] patterns appear to indicate that rape and sexual violence have been used by the Janjaweed and Government soldiers (or at least with their complicity) as a deliberate strategy with a view to achieve certain objectives, including terrorizing the population, ensuring control over the movement of the IDP population and perpetuating its displacement. Cases like Kailek demonstrate that rape was used as a means to demoralize and humiliate the population.¹⁰⁸ One witness explained,

¹⁰⁴ International Federation for Human Rights and SOAT Report, DAR-OTP-0090-0377 (Anx H, line 90) at 0381.

¹⁰⁵ HRW Report, DAR-OTP-0090-0173 (Anx 22) at 0186.

¹⁰⁶ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0066, at paras. 226 and 236.

¹⁰⁷ ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 496; ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 728.

¹⁰⁸ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0095, para. 353. *See also* UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0090, para. 333 (“Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of

See, they kill our males and then dilute our blood with rape. The Arabs want to finish us as a people, end our history. We are not wanted and here to be unwanted is a crime. . . .¹⁰⁹

55. The Prosecution also submits evidence of derogatory language being used against the target group. The UNCOI reported that even though other types of derogatory language were also used, [i]n many cases militias attacking “African” villages tend to use derogatory epithets, such as “slaves,” “blacks,” Nuba,” or “Zurga”. . . .¹¹⁰

One witness reported that the attackers

would curse and swear at [the victims] saying ‘these are animals, these are ignorant, kill them!’ They would also say ‘clean them from the country, they are like dirt.’¹¹¹ After describing a rape attack, another witness reported that

Those who abducted us told us that “Ibna kelb, al arat ma-hagatkum” which in Arabic means “little dog, this land is not for you”. . . .¹¹²

b) The existence of an intent to destroy (a group)

1) The extent and nature of the intended destruction

56. The distinguishing element of the *dolus specialis* of genocide is the intent to *destroy* a protected group. The extent of the destructive intent, however, should be distinguished from the requisite intent for ethnic cleansing,¹¹³ under which a perpetrator intends to target an ethnic group, such as by expelling the group from an area, yet lacks the intent to *destroy* that ethnic group within the area. The nature of the destructive intent can also be distinguished from the requisite intent for forced displacement as a crime against humanity. Both of the aforementioned crimes lack the element of an intent to destroy.
57. There is a divergence of jurisprudence, however, as to the evidentiary significance of forced displacement with respect to the establishment of genocidal

Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man. and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called “slaves” or “Tora Bora.”).

¹⁰⁹ Annex to Witness Statement, Annex DAR-OTP-0112-0320 at 0322 to DAR-OTP-0116-1034 (Anx58) (quoted in Prosecution Application, para. 395).

¹¹⁰ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at para. 511; *see also* Witness Transcript, DAR-OTP-0147-0071 at 0103 (explaining that the term ‘Zurga’ is a derogatory term that is meant as an insult).

¹¹¹ Witness Statement, DAR-OTP-0107-0781 (Anx J16) at 0784 at para. 12.

¹¹² Witness Statement, DAR-OTP-0088-0150 (Anx H, line 48) at 0158 at paras. 45–46; *see also* Amnesty International Report October 2006, DAR-OTP-0138-0006 (Anx H, line 50) at 0013 (“The Janjawid told me: ‘You are a Nuba woman, daughter of a whore. You have no right to these cattle and they do not belong to you’”) (emphasis added).

¹¹³ Ethnic cleansing is often classified as persecution as a crime against humanity. *See* ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 562 and 578.

intent. Although the genocidal *actus reus* must consist of one of the listed acts, there has been disagreement over the question of whether, for purposes of demonstrating that an accused possessed genocidal intent, it must be shown that the accused intended to cause the physical or biological destruction of the intended group. Further, there is a lack of consensus regarding what constitutes the physical destruction of the group.

58. Following the approach of the International Law Commission, some *ad hoc* tribunal trial chambers have held that evidence of the perpetrator's intent to destroy must consist of an intent to destroy the group in a biological or physical sense. According to these chambers, such intent must be distinguished from an intent to commit other forms of destruction of the group.¹¹⁴
59. In this regard, the Prosecution submits a variety of evidence which demonstrates an intent to physically destroy. One witness reported,

I heard them [the attackers] say, in Arabic, that they did not want any black person to survive.¹¹⁵ According to a report allegedly circulated within the National Islamic Front,

The Revolution has decided to bypass this tribe, [even though] it occupies a strategic place in dissemination the concepts of the Islamic Movement to Western and Central Africa. It also occupies an area considered to be the Movement's last line of defence in the event of its being cornered. The Movement has thus bypassed this tribe and undertaken to reinforce other powers in the States of Greater Darfur. It has invited heavily armed Chadian tribes into Darfur as well as. . . promoting divide and rule amongst the elements making up the Fur Sultanate (Fur, Tunjur, etc). *The Movement will not feel safe until this tribe is contained or exterminated and the Western front made secure.* . . .¹¹⁶ Another witness corroborated this:

In KORNOL, I heard about what was going on in the rest of the region. People said that all the Government was going to wipe out the rest of the Zaghawas who were still in the area.¹¹⁷

¹¹⁴ See, e.g., ICTY, *Prosecutor v Brdanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, paras. 976–978, 981–982; ICTY, *Prosecutor v Stalde*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, paras. 553–554; ICTR, *Prosecutor v Semarica*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 315 (citing Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May–26 July 1996, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 90, UN Doc. A/51/10 (1996) (“As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group”).

¹¹⁵ Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0065 at para. 21.

¹¹⁶ The Islamic Movement and the Fur Tribe (A secret report), DAR-OTP-0095- 0218 at 0223, English translation at DAR-OTP-0148-0101 (Anx H, line 45) at 0103-0106 (emphasis added); see also Book: Darfur Dotting The ‘i’s And Crossing The ‘t’s by Professor Sulayman Hamid Al Hajj, DAR-OTP-0150- 0105 (Anx 82) at 0108 and 0115-0118.

¹¹⁷ Witness Statement, DAR-OTP-0079-0244 (Anx H, line 63) at 0253 at para. 48. See also Witness Statement, DAR-OTP-0125- 0665 (Anx J47) at 675 at paras. 55, 56 (“The Government believed that the strongest rebel component was the Zaghawa tribe, and that therefore the Zaghawa tribe had to be destroyed. . . in similar fashion the Government believed that the

60. The focus on physical destruction in relation to intent was expressly rejected by Judge Shahabuddeen, however, in his partially dissenting opinion in the *Krstic* Appeal. According to his view, while the terms of the Genocide Convention and the ICTY Statute specify that the “listed act”—or *actus reus*—of the crime of genocide must consist of an act of physical or biological destruction, it is sufficient to demonstrate that the intent with which that act was perpetrated encompassed the destruction of the group, regardless of whether such intended destruction was to be physical, biological, social or cultural.¹¹⁸
61. Another chamber later held that an intent to destroy the group through forcible transfer alone could constitute genocidal intent “when this transfer is conducted in such a way that the group can no longer reconstitute itself—particularly when it involves the separation of its members.”¹¹⁹
62. In order to preserve the choice for a later Trial Chamber to determine which approach it will follow at trial, I adopt the more expansive approach outlined by Judge Shahabuddeen when considering the relevance of evidence of forced displacement in connection with determining whether or not there are reasonable grounds to believe that genocidal intent existed.
63. In addition to the evidence discussed in connection with crimes against humanity, I highlight the following evidence submitted by the Prosecution. A UN Inter-Agency Fact-Finding and Rapid Assessment Mission in Kailek, South Darfur reported that

Massalit and Fur supported the rebels and that they therefore had to be driven out of their lands.”); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at para. 245 (“In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. When asked why they believed they were attacked, some witnesses stated ‘because they want our land and cattle’ or ‘they -want to eliminate us from the area’. Other witnesses referred to statements made by their aggressors during some of the attacks, such as ‘you are Tora Bora, the SLA are your families’, ‘the Fur are slaves, we will kill them’, ‘we are here to eradicate blacks (nuba), ‘we will drive you into poverty’, ‘this is not your land’ or ‘you are not from here’. When asked about the presence of armed groups within the villages, most witnesses denied the existence of rebels in their villages at the time they were attacked.”) (emphasis added); Physicians for Human Rights Report, 2006, DAR-OTP-0119-0635 (Anx J44) at 0644, 0688 (“The men accused them [the group] of being rebel supporters, demanded to know where the men were, and at least one time threatened to shoot them. “One said, ‘We have to kill them,’” she said. “But others said, ‘Don’t bother, don’t waste the bullet, they’ve got nothing to eat and they’ll die from hunger.”).

¹¹⁸ICTY, partial Dissenting Opinion of Judge Shahabuddeen, *Prosecutor v Krstic*, Case No. IT-98-33- A, Appeals Judgment, 19 April 2004, paras. 49–50 (citation omitted). Judge Shahabuddeen explicitly stated that he was not making an argument for the recognition of cultural genocide as a genocidal *actus reus*, as he was drawing a distinction as to the intent of the crime only. Nevertheless, he recognised that ‘the destruction of culture may serve evidentially to confirm an intent, to be gathered from the circumstances to destroy the group as such.’ *Id* at para. 53.

¹¹⁹ICTY, *Prosecutor v Blagojevic*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, para. 666.

[t]he 23 Fur villages in the Shattaya Administrative Unit have been completely depopulated, looted and burnt to the ground (the team observed several such sites driving through the area for two days).¹²⁰ During its investigation, the UNCOI found that

Many reports also note that villages were burnt even after these had been abandoned by the inhabitants who fled to IDP camps in larger urban centres in Darfur, or to neighbouring Chad. This has led many observers to fear that this is a part of the policy executed through the Janjaweed to expel the population from the targeted areas and to prevent the immediate or, possibly, long-term return of the inhabitants.¹²¹

2) *The focus of the destructive intent*

64. The focus of the destructive intent required for genocide must also be distinguished from the intent to destroy rebels and sources of support for rebels to the extent that they are considered combatants. Within the framework established by customary international law, however, the suppression and targeting of rebel groups and their supporters is legal only to the extent that the targeted persons are combatants.¹²² Civilians, by contrast, do not lose their protected status and become legitimate targets until they participate in hostilities to the extent that they become combatants.¹²³ For example, it would not be permissible to make a blanket assumption that members of a protected group are, by definition, rebels or rebel supporters and to target or seek to destroy them accordingly.
65. Indeed, throughout history, groups who were subjected to genocide were targeted on the basis of an allegation that they posed a threat to the perpetrating group. For example, during the Rwandan genocide, Hutu perpetrators accused members of the Tutsi ethnicity of supporting the RPF, a rebel group. Yet, government-authored execution lists of Tutsi who were “suspected” RPF members and supporters were considered evidence of genocidal intent,¹²⁴ rather than evidence of an intent to target rebels. Similarly, the systematic and indiscriminate targeting of Mayan civilians in Guatemala on the basis of their

¹²⁰ DAR-OTP-0030-066 (Anx J63) at 0068.

¹²¹ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0084 at para. 304; *see also* UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0163 at para. 636 (“It is estimated that more than 1.8 million persons have been forcibly displaced from their homes, and are now hosted in IDP sites throughout Darfur, as well as in refugee camps in Chad. The Commission finds that the forced displacement of the civilian population was both systematic and widespread, and such action would amount to a crime against humanity.”).

¹²² Article 3(1) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

¹²³ Article 51(3) of the Protocol I of 10 June 1977, Additional to the Geneva Conventions of 12 August 1949 (“Additional Protocol I”); Article 13(3) of the Protocol II of 10 June 1977, Additional to the Geneva Conventions of 12 August 1949. Moreover, “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Article 50(1) of Additional Protocol I.

¹²⁴ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 309.

ethnicity and under the pretext that they were supporting rebels was found to constitute genocide, not an operation to eradicate support for rebel groups.¹²⁵

66. Thus, even if some evidence indicates that some members of the “African tribes” were assisting rebels, as suggested by the Majority,¹²⁶ such evidence would not legitimize an estimation that the entire group of “African tribes” was a lawful target.

c) The existence of an intent to destroy a group as such

1) “In part”: the substantial part requirement

67. When evaluating whether an Accused formulated intent to destroy a protected group “in part,” such part has been required to be “substantial.”¹²⁷ While it should be remembered that the *ad hoc* tribunals have held that there is no numeric threshold of victims necessary to establish genocide,¹²⁸ substantiality is indeed defined not only in terms of numerosity,¹²⁹ but also in relation to other factors. For example, if only a part of the group is targeted, the proportion of the targeted group in relation to the protected group as a whole, as well as the prominence of the targeted group within the protected group may be relevant to a determination of substantiality.¹³⁰ The perpetrator’s zone of control may also be relevant. According to the *Krstic* Appeals Chamber, for example, the destructive intent of the Nazis would be considered in the context of the extent of the Nazi regime’s territorial control.¹³¹
68. In this regard, in order to demonstrate numerosity, the Prosecution submits evidence tending to show that (i) between 2705 and 3413 persons were killed directly in connection with nine attacks on predominantly Fur villages,¹³²

¹²⁵ See e.g. Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations, para. 111.

¹²⁶ Majority Decision, para. 180.

¹²⁷ ICTY, *Prosecutor v Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 586; ICTR, *Prosecutor v Bagilishema*, Case No. 1CTR-95-1A-T, Trial Judgment, 7 June 2001, para. 64.

¹²⁸ ICTR, *Prosecutor v Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgment, 1 December 2003, para. 809.

¹²⁹ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 97.

¹³⁰ ICTY, *Prosecutor v Krstic*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para. 12–13.

¹³¹ ICTY *Prosecutor v Krstic*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para. 12–13.

¹³² See Prosecution Application, para. 107 (citing UNCOI Material, DAR-OTP-0011-0077 at 0078-0079; Public Source, DAR-OTP-0002-0207 at 0243; Public Source DAR-OTP-0090-0377; Witness Statement, DAR-OTP-0112-0142 at 0151-0152 paras 45-46; Witness Statement, DAR-OTP-0095-0095 at 0107-0011 paras 73-107; UNCOI Material DAR-OTP-0010-0229 at 0255; UNCOI Material DAR-OTP-0018-0010 at 0077 para. 272; UNCOI Material DAR-OTP-0055-0224 at 0229; Witness Statement, DAR-OTP-0088-0038 at 0042-0046, paras. 18-35; Witness Statement, DAR-OTP-0124-0196 at 0215 para. 116; Witness Statement, DAR-OTP-0112-0175 at 0195-0196; Witness Statement, DAR-OTP-00126-0005; UNCOI Material DAR-OTP-0010-0003 at 0036; UNCOI Material DAR-OTP-0018-0010 at 0078 para. 273; SOAT statement, DAR-OTP-0087-0327; Witness Statement, DAR-OTP-0119-0711 at 0718 para. 37; Witness Statement. DAR-OTP-0119-0711 at 0719 para. 41; Video Material, DAR-OTP-0028-0199).

- (ii) approximately 530 persons were killed directly in connection with three attacks on predominantly Masalit villages;¹³³ and (iii) approximately 925 persons were killed during five attacks on predominantly Zaghawa villages.¹³⁴
69. In relation to the proportion of the protected group that has been targeted, the Prosecution submits its own calculation based on primary source data contained in a UNHCR report.¹³⁵ According to the Prosecution, 97% of predominantly Fur and 85% of predominantly Masalit villages within the area of three administrative units, Habila, Wadi Saleh and Mukjar, were attacked.¹³⁶

2) *The term as such*

70. The inclusion of the term *as such* reemphasises the focus of the prohibition of genocide: the destruction of the protected group itself, rather than the destruction of its individual members. As the *Akayesu* Trial Chamber put it, “[t]he victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.”¹³⁷ As a result, in order to consider whether there are reasonable grounds to believe that an alleged perpetrator intended to destroy the group as *such*, the Prosecution must submit evidence showing that the victims were targeted by reason of their membership in the protected group.¹³⁸
71. In this respect, the crimes of genocide and persecution as a crime against humanity can seem similar, as both contain an element of discriminatory targeting. Genocidal intent is distinguishable from persecutorial intent, however,

¹³³ See Prosecution Application, para. 108 (citing Witness Statement, DAR-OTP-0088-0262 at 0275-0276, paras 81-82; Public Source, DAR-OTP-0138-0024, at 0026 and 0028; Public Source, DAR-OTP-0108-0562, at para. 32 Public Source, DAR-OTP-0147-0931 at 0936; Public Source DAR-OTP-0147-1230 at 1271 para 169; Public Source DAR-OTP-0147-1125 at 1194-1195 paras 240-244(a)).

¹³⁴ See Prosecution Application, para. 109 (citing Witness Statement, DAR-OTP-0107-0473 at 0487-0488 para. 64, Public Source DAR-OTP-0121-0084; Public Source DAR-OTP-0121-0078; Public Source, DAR-OTP-0121-0086; Witness Statement, DAR-OTP-0095-0660 at 0669 paras 37, 38 and 40 and Witness Statement, DAR-OTP-0094-0668: Witness Statement, DAR-OTP-0094-0064 at 0075-0079; Public Source, DAR-OTP-0121-0014; Public Source, DAR-OTP-0121-0036 at 0037; Public Source, DAR-OTP-0121-0039; Public Source, DAR-OTP-0138-0024, at 0026 and 0028; Public Source, DAR-OTP-0108-0562, at para. 32. Public Source, DAR-OTP-0147-0931 at 0936; Public Source DAR-OTP-0147-1230 at 1271 para. 169; Public Source DAR-OTP-0147-1125 at 1194-1195 paras 240-244(a)).

¹³⁵ UNCHR Report, “Monitoring of Returns in Southern West Darfur,” DAR-OTP-0145-0237 (Anx J2). In order to preserve flexibility for a future Trial Chamber to select an approach to the evidence, I follow the approach of the *Brdanin* Trial Chamber, which considered the proportion of the protected group that were victims of all genocidal acts within the scope of the ICTY Statute. See Prosecutor v. Brdanin, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 974.

¹³⁶ Prosecution Application, para. 94.

¹³⁷ ICTR, *Prosecutor v. Akayesu*. Case No. ICTR-96-4-T. Trial Judgment, 2 September 1998, paras. 521-522.

¹³⁸ ICTY, *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 561.

because the former encompasses both an intent to target the group itself and the intent to destroy the group:

Even though they both have discriminatory elements, some of which are common to both crimes, in the case of persecution, the perpetrator commits crimes against individuals, on political, racial or religious grounds. It is this factor that establishes a demarcation between genocide and most cases of ethnic cleansing.¹³⁹

72. Nevertheless, the victims' membership in the protected group need not be the only reason for which they were targeted. As stated by the *Niyitegeka* Appeals Chamber, the term *as such* has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term "as such" clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting "as such" to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership.¹⁴⁰

For example, a certain group may be targeted not solely because of its ethnicity, but also because of a perceived support for rebel groups. Such a perception, however, does not legitimize the targeting of a protected group as such.

73. Various types of evidence support an inference that an intent to destroy the group as such existed. Direct evidence could include statements by the perpetrator implying an intent to destroy,¹⁴¹ while circumstantial evidence might include, *inter alia*: (i) evidence of widespread systematic violence against the targeted group;¹⁴² (ii) evidence of a general campaign of persecution against the targeted group;¹⁴³ and (iii) evidence of members of the targeted group being separated or classified according to their membership in the targeted group prior to the commission of the crime.¹⁴⁴

¹³⁹ ICTY, *Prosecutor v. Sikirica et al*, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, 3 September 2001, para. 89; see also ICTY, *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 67–68, 79.

¹⁴⁰ ICTR, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Appeals Judgment, 9 July 2004, para. 53.

¹⁴¹ ICTY, *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 73, 75; ICTY, *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 563; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 517.

¹⁴² ICTY, *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 73; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Judgment, 6 December 1999, para. 400.

¹⁴³ ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 312.

¹⁴⁴ ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 429; ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 287; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 515.

74. In this connection, I recall the discussion regarding the widespread and systematic pattern in the context of crimes against humanity.¹⁴⁵ More specifically, the following evidence demonstrates a general campaign of persecution against the targeted group. First, regarding the existence of a discriminatory document circulated within the National Islamic Front, one witness related,

After a historical introduction on the Fur the document indicated that they were to be excluded from key positions in the intelligence service, military, or the police administration and secondly, the Fur areas were to be destabilized in order to instigate the moving out of the Fur from Darfur.¹⁴⁶ Further, according to the UNCOI report,

In a vast majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masalit and Zaghawa tribes, who were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion appears to have been directed to bring about the destruction of livelihoods and the means of survival of these populations. The Commission also considers that the killing, displacement, torture, rape and other sexual violence against civilians was of such a discriminatory character and may constitute persecution as a crime against humanity.¹⁴⁷

75. Additionally, the Prosecution submits some evidence of the “African tribes” being classified according to their membership in the group, prior to the commission of a crime. One witness reported,

I had a shop in the market of New BENDISI, and the men destroyed ten barrels of oil and looted kebkebay from it. They also took sugar and tea and other things from my shop. The looting took place right in front of us, so I could see everything.

¹⁴⁵ Majority Decision at paras. 83–89.

¹⁴⁶ Witness Statement, DAR-OTP-0095-0002 (Anx J95) at 0007 at para. 20.

¹⁴⁷ DAR-OTP-0018-0010 (Anx 17) at 0163, para. 638. See also Short-Cut to Decay, The Case of the Sudan, DAR-OTP-0024-0200 (Anx H, line 41) at 0204-0205 (“The dirty war that has been imposed upon us [i.e. the Fur], began as an economic war but soon it assumed a genocidal course aiming at driving us out of our ancestral land in order to achieve certain political goals. We have followed, with dismay, all the different phases of this war from the time its took the innocent appearance of unrelated incidents of theft until it developed into armed robbery that targeted Fur individuals only. At a later stage it aimed at the destruction of our economic base and the lifeline of our survival by making it impossible to practise agricultural activities by the constant and brutal attacks on farmers and farming communities. We watched with the greatest degree of alarm the sinister development which aimed at full economic siege of our communities by making the movement of commodities impossible through robbing markets and isolating urban areas from the rural hinterland. At the present time we are witnessing yet another and yet more sinister phase of this dirty war: the aim is a total holocaust and no less than the complete annihilation of the Fur people and all things Fur. How are we to understand the brutal mutilation of Fur victims and the burning alive of residents of Fur villages? The message is quite clear: empty the land and do not allow any Fur survivors to come back and re-establish their villages.”).

When the Fursan were looting, some other people were assisting them to identify the shops which had something to loot. They had placed in advance some special marking on the shop doors to identify the ones which were not to be looted. Our shops were in one line and there was one man from the Mararit tribe whose shop had a piece of green cloth hanging from the door hinge. The shop was not looted. I saw later that all other shops which were not looted had similar signs. The collaborators were from the Mararit and the Tama tribes.¹⁴⁸

76. The evidence submitted in relation to sections (a), (b) and (c) is sufficient to satisfy me that it would be reasonable to infer—among other things—that Omar Al Bashir possessed the intent to destroy the ethnic group of the “African tribes” as such.

iii. Whether any of the evidence provided by the Prosecution renders an inference of genocidal intent unreasonable

77. As outlined above, once it can be determined that the Prosecution submits sufficient evidence to render an inference of genocidal intent reasonable, the question then becomes whether any evidence submitted by the Prosecution renders such an inference unreasonable. In their review of the evidence, the Majority reached the opposite conclusion regarding the existence of reasonable grounds to believe that Omar Al Bashir possessed genocidal intent. I will therefore examine their analysis in order to determine whether an inference of genocidal intent is unreasonable.
78. The Majority notes that in the majority of attacks on villages inhabited by the “African” tribes, the “large majority” of inhabitants were neither killed nor injured. Yet, the means of genocidal destruction need not be the most efficient,¹⁴⁹ and the Majority does not consider the proportion of villagers who were forced to flee into the harsh, Darfurian terrain.¹⁵⁰
79. The Majority also relies on the fact that the Prosecution does not claim that the GoS established long-lasting detention camps in Darfur.¹⁵¹ While the existence of such camps would certainly be relevant to support an inference of genocidal intent, proof of such camps is not a required element of any of the counts of genocide alleged.¹⁵² Furthermore, the Prosecution alleges and provided evidence of the existence of detention centres, at which there are reasonable grounds to believe that victims were detained under the apparent custody and control of GoS forces.¹⁵³

¹⁴⁸ Witness Statement, DAR-OTP-0119-0503 (Anx 65) at 0520–0523 at paras. 76–87.

¹⁴⁹ ICTY, *Prosecutor v xrstic*, Case No. IT-98-33-A, Appeals Judgment 19 April 2004, para. 32.

¹⁵⁰ See discussion at paras. 97–102, *infra*.

¹⁵¹ Majority Decision, para. 197.

¹⁵² Elements of Crimes. Articles 6(a), 6(b) and 6(c).

¹⁵³ See, e.g. Prosecution Application, para. 146 (“In its Final Report to the Security Council, the UNCOI found that ‘torture has been carried out on such a large scale and in such widespread and systematic manner not only during attacks on the civilian population, where it was inextricably linked with these attacks, but also in detention centres under the authority of

80. The Majority suggests that the evidence submitted by the Prosecution reflects a significantly different reality than that outlined in the Prosecution Application regarding the alleged GoS' hindrance of medical and humanitarian assistance to persons in IDP camps. While the Prosecution's allegations indeed focus on the role of Omar Al Bashir and the GoS,¹⁵⁴ and the evidence cited by the Majority indeed illuminates the effect of additional factors on the situation, in my view, the presence of such additional factors does not negate the role of Omar Al Bashir and the GoS.
81. Moreover, the Majority suggests that the evidence submitted by the Prosecution reflects a significantly different reality than that outlined in the Prosecution Application regarding the conditions of life within the IDP camps. As an example, the Majority refers to a report by the United Nations High Commissioner for Human Rights, which suggests, *inter alia*, that (i) rebel supporters may live within the camp and (ii) that there may be criminal elements operating within the camps.¹⁵⁵ I note that such allegations are unproven; indeed, a search warrant issued on suspicion of unlawful possession of weapons did not name specific individuals, but rather, "appeared to be a blanket warrant to search the entire camp."¹⁵⁶ According to the same report, information regarding the presence of light and heavy arms within the camps remains unverified by UNAMID.¹⁵⁷ However, even if such allegations were true, such assistance or criminality would not justify targeting the entire camp on the basis of its ethnic affiliation by preventing the distribution of humanitarian assistance.
82. Finally, I note that the Majority has taken into consideration the fact that the Prosecution now suggests that certain evidence, which was also submitted in connection with the case against Ahmad Harun, is indicative of genocidal intent in connection with the present Application, even though it did not so suggest in its application for an arrest warrant for Ahmad Harun himself. In my view, this fact has no effect upon the significance of such evidence, as there are significant differences between this case and the case against Ahmad Harun. For example, in contrast to the Application for an arrest warrant for Ahmad Harun, the present Application covers a time period between 2003 and 2008. The Prosecution also explains that, in examining whether there was sufficient evidence to include allegations of genocidal intent, the Prosecution placed particular emphasis on the implications of evidence of forcible displacement into harsh terrain, on evidence of conditions in the IDP camps and

the NISS and the Military Intelligencer) (emphasis added); Witness Statement, DAR-OTP-0097-0292 (Anx J36) at 0295-0300, paras. 20–31; Witness Statement, DAR-OTP-0094-0423 (Anx24) at 0434, paras. 46–51.

¹⁵⁴ See generally Prosecution Application, paras. 185–198.

¹⁵⁵ "Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan. *Killing and injuring of civilians on 25 August 2008 by government security forces. Kalma IDP camp. South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union, ICC-02-05-179-Conf-Exp-Anx2, section on "Background and Context," pp. 3–5.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

on evidence of efforts by the GoS to block humanitarian assistance.¹⁵⁸ Accordingly, I do not consider the different characterisation of such evidence to be relevant to its probative value.

83. For these reasons, I do not consider that any evidence submitted by the Prosecution renders an inference of genocidal intent unreasonable.

iv. Whether or not there are reasonable grounds to believe that the mental element of the crime of genocide has been fulfilled

84. In my view, the evidence discussed above demonstrates that the possession of genocidal intent is one reasonable inference to be drawn from the available evidence. As previously explained, this inference need not be the only reasonable one at this stage. Indeed, as noted by the Majority, there are also reasonable grounds to believe that the evidence presented supports various alternative conclusions.¹⁵⁹
85. Indeed, it is possible that, at a later stage, evidence might be presented such that the Chamber could later determine that there are not substantial grounds to believe that Omar Al Bashir possessed genocidal intent. A Trial Chamber might later conclude that some evidence would not permit it to find, beyond a reasonable doubt, that Omar Al Bashir possessed genocidal intent. However, this is not the task of the Pre Trial Chamber at the arrest warrant stage.
86. Rather, once there is sufficient evidence to support a reasonable inference that genocidal intent exists, the Chamber need only examine whether there is also evidence that would conclusively disprove the existence of genocidal intent. In my view, no evidence presented by the Prosecution conclusively precludes the reasonable inference that Omar Al Bashir possessed genocidal intent. Thus, I am satisfied that there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent.

D. Actus Reus

87. Having examined whether there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent, I will now turn to the question of whether the Prosecution submitted sufficient evidence to establish reasonable grounds to believe that the *actus reus* element of the crime of genocide is also fulfilled. I note that because the Majority did not find sufficient evidence to establish reasonable grounds to infer genocidal intent, the Majority did not reach the question of whether the Prosecution provides sufficient evidence to establish the *actus reus* elements of counts 1, 2, and 3.
88. The Prosecution's Application contains allegations supporting three counts of genocide:

¹⁵⁸ ICC-02/05-T-2-Conf-Exp-Eng, page 20, lines 5–14. Additionally, [REDACTED]. ICC-02/05-T-2- Conf-Exp-Eng, page 21, lines 5–9.

¹⁵⁹ Majority Decision, para. 205.

- i. genocide by killing under article 6(a) of the Statute;
 - ii. genocide by causing serious bodily or mental harm under article 6(b) of the Statute; and
 - iii. genocide by deliberate infliction on each target group conditions of life calculated to bring about the physical destruction of the group under article 6(c) of the Statute.¹⁶⁰
89. Once again, I note that a perpetrator may employ various means in the course of implementing a genocidal plan. For example, in one area, there may be many killings, while in another, there may be massive forced displacement into inhospitable terrain. Particularly in a context like Darfur, where causing persons to flee their villages may result in an acute lack of access to water supply and therefore almost certain death, it will be for future trial chambers to determine whether such acts of forced displacement fall under article 6(a) or article 6(c) of the Statute.
90. I will now examine the allegations and evidence submitted by the Prosecution with respect to each count in turn.

i. Genocide by killing—Article 6(a) of the Statute

91. Read together, the terms of article 58 and article 6(a) of the Statute require the Prosecution to provide sufficient evidence to demonstrate that there are reasonable grounds to believe that members of the “African tribes” were killed.¹⁶¹
92. As described by the Majority, the Chamber is of the view that there are reasonable grounds to believe that mass killings took place in the context of a widespread and systematic attack on the Fur, Masalit and Zaghawa of Darfur.¹⁶² The Chamber has also found that there are reasonable grounds to believe that murders took place in the context of the same widespread and systematic attack.¹⁶³
93. On the basis of this evidence, as well as the evidence discussed *supra* in connection with the targeting of the “African tribes,”¹⁶⁴ I am satisfied that there are reasonable grounds to believe that members of the “African tribes” were killed as part of the manifest pattern of conduct outlined in the Majority Decision within the meaning of article 6(a) of the Statute.¹⁶⁵

ii. Genocide by causing serious bodily or mental harm—Article 6(b) of the Statute

94. In its Application, the Prosecution alleges that members of the target group were subjected to serious bodily or mental harm,¹⁶⁶ including acts of

¹⁶⁰ Prosecution Application, paras. 104, 119, 172.

¹⁶¹ Elements of Crimes, article 6(a)(i).

¹⁶² Majority Decision, para. 97.

¹⁶³ Majority Decision, para. 94.

¹⁶⁴ See discussion at Part III.B, *supra*.

¹⁶⁵ See discussion at Part III.A, *supra*.

¹⁶⁶ Prosecution Application, para. 119.

rape,¹⁶⁷ torture¹⁶⁸ and forcible displacement¹⁶⁹ that have occurred within the same context of the manifest pattern of conduct. The Prosecution also states that the jurisprudence of the *ad hoc* tribunals reveals that cruel treatment, torture, rape and forcible deportation may constitute serious bodily or mental harm,¹⁷⁰ although such harm “must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long term disadvantage to a person’s ability to lead a normal and constructive life.”¹⁷¹

95. In this regard, I note that the Chamber has held that there are reasonable grounds to believe that acts of torture,¹⁷² forcible transfer,¹⁷³ and rape occurred in the context of a widespread and systematic attack on the Fur, Masalit and Zaghawa of Darfur.¹⁷⁴
96. On the basis of this evidence, as well as that discussed *supra* in connection with the targeting of “African tribes,” I am satisfied that there are reasonable grounds to believe that members of the “African tribes” were subjected to serious bodily and mental harm as a part of the manifest pattern of conduct outlined in the Majority Decision within the meaning of article 6(b) of the Statute.

iii. Genocide by deliberate infliction on the group conditions of life calculated to bring about the physical destruction of the group—Article 6(c) of the Statute

97. The Prosecution further alleges that a substantial part of the target group was systematically expelled from their land and displaced into inhospitable terrain, where some members succumbed to dehydration, thirst and disease.¹⁷⁵ The Application states that the group’s means of survival, including food and water supplies, as well as shelter from the inhospitable Darfurian terrain, were systematically destroyed.¹⁷⁶ According to the Prosecution, while some members found their way to IDP camps, the GoS denied and hindered the delivery of medical and humanitarian assistance which were necessary to survive in the camps.¹⁷⁷
98. First, in my view, such an allegation must be analysed in the context of Darfur’s harsh terrain, in which water and food sources are naturally scarce, and

¹⁶⁷ Prosecution Application, para. 121.

¹⁶⁸ Prosecution Application, para. 146.

¹⁶⁹ Prosecution Application, para. 156.

¹⁷⁰ ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 504.

¹⁷¹ Prosecution Application, para. 119 (citing *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 513).

¹⁷² Majority Decision, para. 104.

¹⁷³ Majority Decision, para. 100.

¹⁷⁴ Majority Decision, para. 108.

¹⁷⁵ Prosecution Application, para. 172.

¹⁷⁶ Prosecution Application, para. 174.

¹⁷⁷ Prosecution Application, paras. 185 to 198.

shelter is of utmost importance.¹⁷⁸ Second, I note that, in contrast to the Majority's characterisation thereof,¹⁷⁹ the Prosecution's allegations refer not only to the destruction of water sources, but more generally to the destruction of "means of survival," which includes food supplies, food sources, and shelter, in addition to water supplies and sources.¹⁸⁰

99. Moreover, in my view, the same NGO report cited by the Majority adequately corroborates the allegations made by the Prosecution with respect to the destruction of the victims' means of survival.¹⁸¹ The report explains that many families depended on farming as a major food source, yet photographs of areas attacked by the Janjaweed revealed burned tree stumps and "no visible signs of vegetation."¹⁸² Further, the report states that, "villagers interviewed by [the NGO] reported witnessing widespread destruction of water sources,"¹⁸³ and notes that generally, attackers torched family compounds, thereby destroying the shelter provided.¹⁸⁴ Especially in light of the harshness of the surrounding terrain, I am satisfied that this evidence provides reasonable grounds to believe that the group's means of survival were systematically destroyed.
100. The harshness of the terrain also informs my view of the significance of the alleged GoS obstruction of access for humanitarian aid workers. The Prosecution submits that those displaced by the attacks on their villages cannot survive without assistance, and that Omar Al Bashir has significantly hindered humanitarian access to the region.¹⁸⁵ Thus, even if the level of obstruction

¹⁷⁸ Physicians for Human Rights, Report *Darfur' Assault on Survival. A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0644 ("It is also important to understand that outside of village life, Darfur is an extremely difficult place to survive. At the foot of the expanding Sahara desert, it is known for its searing heat, recurrent drought and minimal infrastructure. While Darfurians have developed complex coping mechanisms enabling them to thrive within their villages, when people are herded from their homes and chased into a land that offers little shelter from the forbidding sun and penetrating winds, no potable water and no animals for food, milk and transport, they succumb to starvation, dehydration and disease.").

¹⁷⁹ Majority Decision, para. 93.

¹⁸⁰ See Prosecution Application, paras. 174–176. Accordingly, in my view, the Majority's characterisation results in a misconstruction of the evidence. See Majority Decision, para. 93 (finding that "there are no reasonable grounds to believe that such a contamination [of the water sources] was a core feature" of the attacks).

¹⁸¹ This report was written on the basis of field research carried out during three separate trips to the region over a 15 month period, which included interviews with survivors of attacks on three villages and surrounding areas with a total population of 30,000 to 40,000 persons. Physicians for Human Rights, Report *Darfur Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0644.

¹⁸² Physicians for Human Rights, Report *Darfur. Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0675.

¹⁸³ Physicians for Human Rights, Report *Darfur. Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0679.

¹⁸⁴ Physicians for Human Rights, Report *Darfur Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0678.

¹⁸⁵ ICC-02/05-T-2-Conf-Exp-Eng at p. 5, lines 2–3.

differed over time, as suggested by the Majority,¹⁸⁶ the periods during which the obstruction was high would have significant consequences on the ability of the population to survive.

101. Even though, as the Majority implies, instability and fighting between GoS and rebel forces may also affect the degree to which certain areas are accessible to humanitarian workers, according to an NGO report, humanitarian agencies have faced obstruction even in secure areas, despite the introduction of special administrative procedures aimed at facilitating access in 2004.¹⁸⁷ According to this report, in 2006, the GoS passed a new law further regulating the operation of non-governmental organisations.¹⁸⁸ Indeed, a November 2007 report of the Human Rights Council stated that even though an agreement to allow access for humanitarian aid workers had been signed between Sudanese officials and the United Nations in March 2007, the UN received complaints alleging that the letter and spirit of the agreement had been violated.¹⁸⁹ The same report detailed a number of instances in which officials of the GoS denied access to certain areas to humanitarian aid workers.¹⁹⁰
102. On the basis of this evidence, as well as that discussed *supra* in connection with the targeting of “African tribes,” I am satisfied that there are reasonable grounds to believe that members of the “African tribes” were subjected to conditions calculated to bring about the destruction of the group.

IV. MODE OF LIABILITY: CO-PERPETRATION UNDER ARTICLE 25(3)(A) OF THE STATUTE

103. In addition, I respectfully disagree with the Majority’s assessment of the evidence submitted by the Prosecution in connection with the mode of liability.¹⁹¹ As the Majority acknowledges, in order to substantiate an allegation that a crime was committed through co-perpetration under article 25(3)(a) of the Statute, the Prosecution must demonstrate that the co-perpetrators shared control over the crime; and each co-perpetrator must have played an essential role in the commission of the crime.¹⁹²
104. In my review of the evidence, I agree that there is sufficient evidence to establish reasonable grounds to believe that there was a common plan,¹⁹³

¹⁸⁶ Majority Decision, para. 189.

¹⁸⁷ HRW Report, *Darfur Humanitarian Aid under Siege*, May 2006 (Anx J55) DAR-OTP-0107-1076 at 1077.

¹⁸⁸ HRW Report, *Darfur Humanitarian Aid under Siege*, May 2006 (Anx J55) DAR-OTP-0107-1076 at 1077.

¹⁸⁹ Human Rights Council, Human Rights Situations that Require the Council’s Attention (Anx 76), DAR-OTP-0138-0116 at 0193.

¹⁹⁰ Human Rights Council, Human Rights Situations that Require the Council’s Attention (Anx 76), DAR-OTP-0138-0116 at 0193-0194.

¹⁹¹ See footnotes 229-242 in Majority Decision.

¹⁹² ICC-01/04-01/06-803-IEN, para. 342. See also ICC-01/04-01/07-717, para. 521.

¹⁹³ Majority Decision, paras. 214-215.

although in my view, the objective of the plan was to target the “African tribes,” who were perceived by the GoS as being close to rebel groups, such as the SLM/A and the JEM. I also agree that the Prosecution has submitted evidence demonstrating the official capacity of various individuals within the government,¹⁹⁴ and that some members of the government sometimes acted with Omar Al Bashir.¹⁹⁵ I also agree that it can be inferred that, as members of the highest level of the GoS, these persons played an essential role in the commission of the crime. However, I do not find any evidence which addresses the issue of the locus of control; it is unclear whether such control indeed rested fully with Omar Al Bashir, or whether it was shared by others such that each person had the power to frustrate the commission of the crime.¹⁹⁶ For this reason, I would decline to find reasonable grounds to believe that Omar Al Bashir was responsible through co-perpetration and instead issue an arrest warrant based only on the mode of liability alleged by the Prosecution, indirect perpetration.

V. CONCLUSION

105. On the basis of the foregoing evidence, I am satisfied that there are reasonable grounds to issue an arrest warrant on the basis of the existence of reasonable grounds to believe that Omar Al Bashir has committed the crime of genocide. Accordingly, I respectfully dissent from the Majority’s decision not to issue an arrest warrant on the basis of genocide.
106. Additionally, I respectfully dissent from the Majority’s finding that there are reasonable grounds to believe that Omar Al Bashir is responsible as a co-perpetrator under article 25(3)(a) of the Statute.

Done in both English and French, the English version being authoritative.



Judge Anita Ušacka

Dated this Wednesday 4 March 2009

At The Hague, The Netherlands

¹⁹⁴ Witness Statement (Anx. J95) DAR-OTP-0095-0002 at 0016-0017, para. 55; and at 0024, para. 88; at 0025, paras. 89 and 92; and at 0029, para. 112; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0016-0017, paras. 70–74; Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0610, para. 144

¹⁹⁵ Witness Statement (Anx. J95) DAR-OTP-0095-0002 at 0013, para. 41; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, paras. 47 and 48.

¹⁹⁶ See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-716-Conf, para. 525. In fact, [REDACTED]. ICC-02/05-T-2-Conf-Exp-Eng at p. 61. lines 6–10.

DOCUMENT 7

Believing that the majority ruling by the ICC Judges of Pre-Trial Chamber 1 to deny his application for a warrant of arrest against Sudanese President Omar al Bashir on charges of genocide was incorrect, ICC Prosecutor Luis Moreno-Ocampo filed an appeal with the ICC Appeals Chamber. In his appeal, Moreno-Ocampo argued that the Majority “applied the wrong legal test to draw inferences for determining ‘reasonable grounds’ under article 58 of the Statute. As a result, the Majority Decision imposed on the Prosecution an evidentiary burden that is inappropriate for this procedural stage.” Continuing, Moreno-Ocampo spells out exactly how the Majority “applied an erroneous evidentiary test, effectively equal to that of ‘beyond reasonable doubt,’ which is required at the trial stage for a conviction of the Accused.” The Prosecutor’s appeal provides readers with unique insights into the workings of the International Criminal Court, as well the efforts of a prosecutor to bring charges of genocide against an alleged perpetrator.

THE PROSECUTOR’S APPEAL REGARDING DISMISSAL OF HIS APPLICATION FOR A WARRANT OF ARREST AGAINST OMAR HASSAN AHMAD AL BASHIR, INTERNATIONAL CRIMINAL COURT, JULY 6, 2009

INTRODUCTION

1. The Prosecution is appealing the Decision of the Majority of Pre-Trial Chamber I (“the Majority”) that refused to issue a warrant of arrest against President Omar Al Bashir for three charges of genocide.¹ The Prosecution submits that the Majority applied the wrong legal test to draw inferences for determining “reasonable grounds” under Article 58 of the Statute. As a result, the Majority Decision imposed on the Prosecution an evidentiary burden that is inappropriate for this procedural stage.
2. Although the Majority recognised that the applicable standard is one of “reasonable grounds to believe,”² it did in fact apply a higher level of proof, one that can be identified only with the standard of proof “beyond a reasonable doubt.”

¹ ICC-02/05-01/09-3, 4 March 2009 (“the Decision”).

² Decision, para. 158. See also para. 203.

3. The Majority and Judge Ušacka in her Dissenting Opinion agree that the inference of genocidal intent is reasonable.³ However, the Majority concluded that the Prosecution failed to prove “the existence of reasonable grounds to believe that the GoS acted with a *dolus specialis*/special intent to destroy in whole or in part the Fur, Masalit, and Zaghawa groups” because it “is not the *only* reasonable conclusion to be drawn”⁴ (emphasis added). While the Majority implicitly recognized that the inference proposed by the Prosecution is at least one reasonable conclusion,⁵ it required that the Prosecution go further and demonstrate that the intent to commit genocide was the only reasonable conclusion.⁶ Thus, the Majority applied an erroneous evidentiary test, effectively equal to that of “beyond reasonable doubt,” which is required at the trial stage for a conviction of the Accused.
4. This requirement has no foundation in either the Statute or any other applicable law, and conflicts with the nature of an application of an arrest warrant. As Judge Ušacka observed in her Dissenting Opinion, at the stage of issuing an arrest warrant the summary information presented by the Prosecution may allow for more than one inference to be reasonably drawn. In that case, provided that the evidence demonstrates that the inference supporting guilt is reasonable, the Prosecution does not need to prove that all other inferences are unreasonable.⁷
5. Judge Ušacka noted that the Prosecution must meet an increasingly demanding evidentiary threshold at each stage of the proceedings. She quoted the European Court of Human Rights (ECHR), which explained that reasonable suspicion or grounds to believe, sufficient to justify an arrest, does not require the same level of evidence deemed sufficient to convict, or even to confirm charges.⁸ The Prosecution should not be forced to reach the highest threshold at the earliest stage, or to present more evidence than the Statute requires. This is especially important in the present case, where there are public reports that President Al Bashir’s Forces have attacked and tortured persons under suspicion of cooperating with the Prosecution.⁹
6. The Prosecution submitted detailed evidence on the mobilization and use of the entire Sudanese state apparatus for the purpose of destroying a substantial part of the Fur, Masalit and Zaghawa ethnic groups in the entire region of Darfur during more than six years. The Prosecution detailed the public statements, the facts on the ground, and the specificity of the three groups attacked to prove the genocidal intentions of President Omar Al Bashir. It further detailed the massive public information and diplomatic effort of the same President Al Bashir to hide his criminal activity and allow him to pursue his genocidal goals under the radar of the international community. During those

³ Decision, para. 205; Dissenting Opinion of Judge Ušacka (“Dissenting Opinion”), para 84.

⁴ Decision, para. 205; see also Decision paras. 181, 201 and 204(v).

⁵ *Ibid.*

⁶ Decision, para. 159.

⁷ Dissenting Opinion, paras. 32–34; see also para. 86.

⁸ Dissenting Opinion, paras. 8–9.

⁹ See footnote 89, below.

years President Omar Al Bashir exercised both *de jure* and *de facto* sovereign authority, as President of the Republic of the Sudan, the Head of National Congress Party and Commander in Chief of the Armed Forces. In 2003 President Omar Al Bashir ordered the beginning of massive military operations against the Fur, Masalit and Zaghawa villages and, through 2004, he organized the process of strangulation of the displaced communities, denying them any meaningful assistance, preventing the returns, forcing the UN and others to set up the largest humanitarian operation in the world, and yet obstructing each step of their work.

7. The issue on this appeal concerns the proper evidentiary standard that a Pre-Trial Chamber should apply to find an element of the crime, in this case the genocidal intention, for the purposes of issuing a warrant of arrest. Based on the factual findings of the Majority¹⁰ and its agreement that genocidal intent is a reasonable inference to be drawn, and consistent with the conclusions of Judge Ušacka, the Prosecution requests that the Appeals Chamber correct the error of the Majority and enter a finding that there are reasonable grounds to believe that President Al Bashir is also criminally responsible for three counts of genocide.

PROCEDURAL BACKGROUND

8. On 14 July 2008, the Prosecution filed the "Prosecution's Application under Article 58."¹¹
9. On 1 October 2008, the Pre-Trial Chamber held an *ex parte* hearing with the Prosecution.¹²
10. On 17 November 2008, upon request of the Pre-Trial Chamber,¹³ the Prosecution filed additional supporting materials.¹⁴
11. On 3 February 2009, an *ex-parte* hearing was held with the Prosecution, the Registry and the Victims and Witnesses Unit;¹⁵ and on 3 February,¹⁶ 4 February,¹⁷ 6 February¹⁸ and 13 February 2009¹⁹ the Prosecution filed additional written submissions and information.

¹⁰ See paras 55–61, below.

¹¹ ICC-02/05-151-US-Exp and ICC-02/05-151-US-Exp-Anxsl-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxsl & 2. A public redacted version was filed on 12 September 2008, ICC-02/05-157-AnxA ("Prosecution Application"). All references are to this public redacted version.

¹² ICC-02/05-T-2-Conf-Exp-ENG ET.

¹³ ICC-02/05-160 and ICC-02/05-160-Conf-Exp-Anxl.

¹⁴ ICC-02/05-161 and ICC-02/05-161-Conf-AnxA-J.

¹⁵ ICC-02/05-T-4-Conf-Exp-ENG ET.

¹⁶ ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxsl-5; filed pursuant to request of Pre-Trial Chamber (ICC-02/05-176 and ICC-02/05-176-Conf-Exp-Anxl).

¹⁷ ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxA-E; filed pursuant to request of Pre-Trial Chamber made during the hearing on 3 February 2009.

¹⁸ ICC-02/05-186-US-Exp; filed pursuant to undertaking made by the Prosecution during the hearing on 3 February 2009.

¹⁹ ICC-02/05-188-US-Exp; filed pursuant to request of the Pre-Trial Chamber (ICC-02/05-184-Conf-Exp).

12. On 4 March 2009, the Chamber issued the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" ("Decision").²⁰
13. On 10 March 2009, the Prosecution sought leave to appeal the Decision pursuant to Article 82(1)(d), in respect of three issues regarding the refusal of the Majority to issue the warrant of arrest in respect of the genocide counts.²¹
14. On 24 June 2009, the Pre-Trial Chamber granted leave to appeal one issue, regarding the proper standard for drawing inferences at the arrest warrant stage.²²
15. On 2 July 2009, the Prosecution requested an extension of the page limit.²³ The Appeals Chamber granted the extension, by an additional ten pages, on 3 July 2009.²⁴
16. Pursuant to Regulation 65(4), the Prosecution hereby files its Document in Support of Appeal.

THE PROSECUTION'S GENOCIDE CASE

(i) Overview of the Prosecution's submissions

17. In its Application under Article 58, the Prosecution submitted, among other things, that there were reasonable grounds to believe that President Omar Al Bashir bears criminal responsibility for three counts of genocide as a result of:
 - a. the killing of members of the Fur, Masalit and Zaghawa ethnic groups: From March 2003 through 14 July 2008 President Al Bashir's Forces attacked civilians in towns and villages inhabited mainly by the protected groups. As a result of these attacks, just between 2003 and 2005 at least 35,000 civilians, substantially made up of members of the protected groups, were killed outright. Between 80,000 and 265,000 additional persons died "slow deaths" due to the conditions imposed during displacement and in the camps;²⁵
 - b. causing serious bodily or mental harm to members of these groups: President Al Bashir's Forces forcibly expelled millions of people from their homes. Victims were subjected to serious mental harm in different ways, in particular through the condition of displacement, torture and inhuman treatment, and through rape and other forms of sexual violence.²⁶ The victims were forced to witness their own homes and possessions destroyed and/or looted, and were expelled from homelands with which the entire

²⁰ ICC-02/05-01/09-2-Conf and ICC-02/05-01/09-3.

²¹ ICC-02/05-01/09-6-Conf. A public redacted version of the Application for Leave to Appeal was filed on 13 March 2009 (ICC-02/05-01/09-12).

²² ICC-02/05-01/09-21 ("Decision Granting Leave to Appeal").

²³ ICC-02/05-01/09-22.

²⁴ ICC-02/05-01/09-24.

²⁵ Prosecution Application, para. 36 and 111.

²⁶ Prosecution Application, paras. 119–171.

communities have deep historical connections, with no prospect of ever returning.²⁷ Thousands of girls and women became victims of rape and other sexual violence during and in the aftermath of the attacks and in and around the Internally Displaced Persons (IDP) camps. Rape was an integral part of the pattern of destruction that President Al Bashir inflicted upon the protected groups,²⁸ and

- c. deliberately inflicting on these groups conditions of life calculated to bring about the groups physical destruction.²⁹ The attackers drove a substantial part of the protected group into hostile terrain, knowing that there they would not have any means of survival.³⁰ President Al Bashir's Forces destroyed food, wells and water pumping machines, shelter, crops and livestock, as well as any physical structures capable of sustaining life or commerce.³¹ International humanitarian assistance saved the lives of almost 2.5 million people within the camps for IDPs outside larger cities in Darfur.³² However President Al Bashir's Forces continued to target members of the protected groups within the camps for displaced persons by systematically refusing to provide meaningful Government aid and hindering other efforts to bring humanitarian aid. Moreover, over a period of years, President Al Bashir's forces consistently blocked and delayed the delivery of aid, expelled relief staff, denied visas and travel permits, and imposed unnecessary bureaucratic requirements on aid workers.³³

(ii) The Chamber's findings

18. Although the Majority declined to find that President Al Bashir intended to commit genocide, the Pre-Trial Chamber entered all the necessary factual findings for the establishment of reasonable grounds to believe that President Al Bashir bears criminal responsibility for the three genocide charges.³⁴ In particular, the Chamber accepted that President Al Bashir was in full control of the "State apparatus" which he directed to implement a counter insurgency campaign, a core component of which was the unlawful, discriminatory and systematic attack on the civilian population of Darfur.³⁵ Between March 2003 and 14 July 2008, President Al Bashir's Forces carried out numerous unlawful attacks on villages and towns predominantly inhabited by members of the Fur, Masalit and Zaghawa groups, and committed crimes of pillaging,³⁶ murder of

²⁷ Prosecution Application, para. 29.

²⁸ Prosecution Application, paras. 10, 23 and 28.

²⁹ Prosecution Application, pp. 20–21.

³⁰ Prosecution Application, paras. 32 and 177.

³¹ Prosecution Application, para. 174.

³² Prosecution Application, para. 14.

³³ Prosecution Application, paras. 185–196.

³⁴ See paras. 55–61, below.

³⁵ Decision, paras. 74–76, 83, 85, 191, 214–219 and 222.

³⁶ Decision, paras. 77, 192(i).

thousands of civilians,³⁷ extermination,³⁸ rape of thousands of women,³⁹ forcible transfer of hundreds of thousands of civilians,⁴⁰ and torture of members of the target groups.⁴¹ In addition, the Pre-Trial Chamber found that President Al Bashir's Forces contaminated wells and water pumps of towns and villages primarily inhabited by members of the protected groups,⁴² and affirmatively obstructed medical and other humanitarian assistance in the IDP camps in Darfur.⁴³

THE PROSECUTION'S GROUND OF APPEAL: THE MAJORITY APPLIED THE WRONG LEGAL STANDARD FOR DRAWING INFERENCES FOR THE PURPOSES OF ARTICLE 58

(i) Overview of the Decision and the Prosecution's argument

19. The Prosecution submits that President Al Bashir's genocidal intent was proven in its Application. The Prosecution stated that the inference of intent from the proven facts met the evidentiary standard applicable to proof by inference at trial; by implication, therefore, the inference urged by the Prosecution clearly should have reached the lower standard applicable at the arrest warrant stage.⁴⁴
20. That position was reiterated on 1 October 2008, with the Prosecution indicating that the evidence presented to the Pre-Trial Chamber went far beyond the evidentiary standard applicable at the Article 58 stage.⁴⁵ This position was correctly understood by Judge Ušacka in her Dissenting Opinion.⁴⁶ In particular,

³⁷ Decision, paras. 94, 192(ii).

³⁸ Decision, paras. 94, 97, 98 and 192(ii).

³⁹ Decision, paras. 108, 180 and 192(iii). See also footnote 127 of the Decision. For rapes in and around the IDP camps, see footnote 121, below.

⁴⁰ Decision, paras. 100–101 and 192(iv).

⁴¹ Decision, paras. 104 and 192(v).

⁴² Decision, para. 93. The Majority found that there are no reasonable grounds to believe that such a contamination was a core feature of their attack.

⁴³ Decision, paras. 181, 185–189.

⁴⁴ Prosecution Application, para 366 and footnote 505. The footnote read as follows: "Krstic, Case No. IT-98-33-A, Appeals Chamber Judgment, para. 41. 'Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime. Where an inference needs to be drawn, it has to be the only reasonable inference available on the evidence.' Brdanin, Case No. IT-99-36-T, Judgement, para. 970 (emphasis added). While this is the evidentiary standard required for proof beyond reasonable doubt, the Prosecution notes that for the purpose of an Art. 58 application the lower standard of reasonable grounds will instead be applicable."

⁴⁵ ICC-02/05-T-2-Conf-Exp, p. 63 (lines 1–12).

⁴⁶ Separate and Party Dissenting Opinion of Judge Anita Ušacka, para. 29. A legal commentator, addressing the Chamber's application of the evidentiary standard at the Article 58 stage, also concludes that the Prosecution's submission with respect to the applicable standard of proof was misinterpreted by the Majority. See commentary by Kevin Jon Heller, The Majority's Complete Misunderstanding of "Reasonable Grounds", in internet blog "Opinio Juris": <http://opiniojuris.org/2009/03/05/the-majoritys-complete-misunderstanding-of-reasonable-grounds/>.

the Majority required that, as a matter of law, in order to issue an arrest warrant on genocide charges, the inference of specific genocidal intent must be the only reasonable inference available on the evidence.⁴⁷ In so doing, it erroneously assumed that there is a “law on proof by inference,” a single criterion that applies at every stage from arrest warrant through conviction and appeal, and that it bars in all instances and at all stages the drawing of an inference if another reasonable inference could also be drawn.

21. The Majority failed to acknowledge that, like the law regarding standard of proof, the principles regarding inferences demand a lower level of certainty at the warrant and confirmation stages than would be applied at the trial.
22. At paragraph 155 of the Decision, the Majority notes that: “the Prosecution emphasizes that, in applying the law on the proof by inference at the current stage of the proceedings, the Chamber must take into consideration that (i) the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) refers to a ‘beyond reasonable doubt’ standard; and that (ii) ‘for the purpose of an Article 58 application of the lower standard of reasonable grounds will instead be applicable,’” The Majority went on to “find the Prosecution’s submission to be a correct statement of the law on the proof by inference applicable before this Court” (para. 156), but then effectively imposed a requirement of proving an inference “beyond reasonable doubt” to describe the level of confidence in the facts underlying the finding of “reasonable grounds to believe.”
23. The Majority considered in paragraph 158 that “such a standard would be met only if the materials provided by the Prosecution in support of the Prosecution application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS’s *dolus specialis*” Explaining the application of this standard, at paragraph 159 the Majority expressly “consider[ed] that, if the existence of a GoS’s genocidal intention is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in Article 58 of the Statute would not have been met.”
24. The Prosecution submits that the criterion of the “only reasonable conclusion to be drawn” is derived from, and effectively imposes, a “beyond reasonable doubt” standard. Confirming this legal error,⁴⁸ in setting out the applicable

⁴⁷ Decision, paras. 158, 159, 205. This is confirmed in the Decision Granting Leave to Appeal, p. 6: “the law on proof by inference became applicable; and that according to this law, an inference can only be drawn if it is the only reasonable conclusion from the joint analysis of the facts proven by the Prosecutor.”

⁴⁸ The Prosecution is not appealing the determination that the evidence permits an alternative inference that Al Bashir did not specifically intend to commit genocide. This appeal is solely based on the legal issue. As the Prosecution has previously submitted (see e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-1219 OA9, 10 March 2008, footnote 19), for errors of law the appropriate standard is *de novo* review by the Appeals Chamber. The Appeals Chamber ought to review any alleged errors of law to determine whether the decision was correct, and substitute its own judgment on the correct legal interpretation, without showing any

standard of proof for decisions under Article 58, the Majority relied on the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) regarding the standard of “beyond reasonable doubt” applicable at trial.⁴⁹

25. The correct approach to drawing inferences under Article 58 is provided at length by Judge Ušacka in her Dissenting Opinion:
- “when the Prosecution alleges that the evidence submitted supports an inference of genocidal intent, in order for there to be reasonable grounds to believe that such an allegation is true, the inference must indeed be a reasonable one”;⁵⁰
 - “when several reasonable inferences may be drawn from the evidence, at the arrest warrant stage, [. . .] [a]ll that is required in order to obtain an arrest warrant is for the Prosecution to establish reasonable grounds to believe that an allegation is true”;⁵¹ and
 - “once sufficient evidence is presented to render an inference of genocidal intent reasonable, one can be satisfied that there are reasonable grounds to believe that genocidal intent exists, unless evidence is also presented which would render an inference of genocidal intent unreasonable.”⁵²
26. Judge Ušacka described how “the Statute proscribes progressively higher evidentiary thresholds which must be met at each stage of the proceedings.” At the arrest warrant/summons stage, the Pre-Trial Chamber need only be “satisfied that there are reasonable grounds to believe”; at the confirmation of charges, the standard is “substantial grounds to believe”; and to convict an accused, the standard is “beyond a reasonable doubt.”⁵³

deference to the finding of the original Chamber. As the ICTY and ICTR Appeals Chambers have consistently held, the Appeals Chamber is “the final arbiter of the law of the International Tribunal” – see e.g. *Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004, para 14; *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para 10; *Rutaganda v Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para 20.

⁴⁹ Decision para. 160 and fns 177 and 178. See *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, 22 March 2006, paras. 53 and 55; *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Judgement, 25 February 2004, paras. 120 and 128; *Prosecutor v. Strugar*, IT-01-42-T, Trial Judgement, 31 January 2005, para. 333 (quoting the above paragraph of the Appeals Judgement in *Vasiljević*); *Prosecutor v. Seromba*, ICTR-01-66-A, Appeals Judgement, 12 March 2008, para. 176 (referencing to *Prosecutor v. Nahimana*, ICTR-99-52-A, Appeals Judgement 28 November 2007, paras. 524–525; and *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Appeals Judgement, 7 July 2006, paras. 40 and 41); *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September 1998, paras. 523, 462 and 673; and *Prosecutor v. Kayishema*, ICTR-95-1-T, Trial Judgement, 21 May 1999, paras. 93–94 and 521. See also Dissenting Opinion, para. 33.

⁵⁰ Dissenting Opinion, para. 32.

⁵¹ Dissenting Opinion, para. 33.

⁵² Dissenting Opinion, para. 34.

⁵³ Dissenting Opinion, para. 8.

(ii) The Majority's standard for assessing inferences was erroneous, and effectively amounted to requiring proof beyond a reasonable doubt

(a) The Majority required the highest standard "beyond reasonable doubt" to reach the lower standard "reasonable grounds to believe"

27. The Majority stated that the Prosecution must "show that the only reasonable conclusion to be drawn [from the material presented] is the existence of reasonable grounds to believe in the existence of a GoS's *dolus specialis*." ⁵⁴ Thus, the Majority effectively required proof of an inference beyond reasonable doubt in order to establish "reasonable grounds to believe" under Article 58. The Majority would not accept that the fact is established for this standard (deduced as a logical consequence from other facts) unless the deduction is the only reasonable one. That level of certainty is imposed without precedent or reason, and imposed only for inferences but not any other form of proof.
28. The Majority initially recognised that the "only reasonable conclusion" is a criterion which applies when making a finding "beyond reasonable doubt." ⁵⁵ However, the Majority failed to recognise that this criterion is the requirement for proof beyond reasonable doubt. As a result, by applying the criterion in addition to that of "reasonable grounds to believe", the Majority effectively used it to transform the lowest standard into a higher standard of "beyond reasonable doubt." The Majority did not, as it should have, adapt the principles for drawing inferences to the standard of "reasonable grounds to believe." Rather, as paragraph 158 shows, the Majority added to the statutory standard an additional requirement that the inference be the only reasonable conclusion:

"the Majority considers that, if the existence of a GoS's genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met." ⁵⁶

29. The Majority's conclusion is erroneous, as Judge Usacka's Dissent makes clear. ⁵⁷ Nothing in Article 58 requires that a conclusion be the only reasonable conclusion. Nor is this a generic requirement for proof by inference at all stages. ⁵⁸ The requirement that there be no other reasonable conclusion available is solely a function of the standard "beyond reasonable doubt." ⁵⁹ It means that any other reasonable

⁵⁴ Decision, para. 158; see also para. 205.

⁵⁵ Decision, para. 155.

⁵⁶ Decision, para. 159.

⁵⁷ Dissenting Opinion, paras. 28–34.

⁵⁸ See further Decision Granting Leave to Appeal, p. 6.

⁵⁹ The Prosecution provided a number of examples in its application, explicitly stating that "this is the evidentiary standard required for proof beyond reasonable doubt" (Prosecution Application, footnote 505). For a further recent illustration see *Prosecutor v Krajisnik*, IT-00-39-A, Appeal Judgement, 17 March 2009, para. 192.

alternatives, i.e. anything that would give rise to a reasonable doubt, have been excluded.⁶⁰ The Majority's standard is higher than that required by Article 58 and is inconsistent with the escalating standards of proof in the Statute.

30. In the Decision Granting Leave to Appeal, the Pre-Trial Chamber denied that it had required proof of an inference beyond a reasonable doubt. It explained that it had not required "that the only reasonable conclusion from the facts proven by the Prosecutor is the existence of genocidal intent beyond reasonable doubt".⁶¹ But its explanation provided no reason to apply the requirement of "only reasonable conclusion" as a condition to reach a lower threshold of "reasonable basis to believe".⁶² Instead, it shows the source of the Majority's error: an erroneous and duplicative two-stage test for drawing inferences at trial.⁶³ This erroneous test led the Majority to apply the first half (i.e. the first iteration of "beyond reasonable doubt" in the form of "only reasonable conclusion") to the arrest warrant stage.

(b) The application of this standard and the assessment of evidence by the Majority amounted to requiring proof beyond reasonable doubt

31. The manner in which the Majority assessed elements of the Prosecution's evidence demonstrates that the standard applied by the Pre-Trial Chamber for proof by inferences effectively required proof "beyond reasonable doubt."
32. By stating that the genocidal intent of President Al Bashir "is not the only reasonable inference that can be drawn"⁶⁴ the Majority accepts that his genocidal intent is reasonably inferred. This is consistent with the findings of Judge Ušacka, who considered whether the inferences proposed by the Prosecution were reasonable based on the evidence and, applying the correct standard,

⁶⁰ See further, Dissenting Opinion, para. 31.

⁶¹ Decision Granting Leave to Appeal, p. 6 (emphasis added).

⁶² If there is only one reasonable inference—that a person has the necessary intent—there can be no reasonable doubt as to that element.

⁶³ The use of inferences to prove guilt beyond reasonable doubt only requires that "when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence." *-Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Judgement, 25 February 2004, para. 120. In that case, the Appeals Chamber noted that "the standard of proof to be applied is beyond a reasonable doubt, and the burden lies on the Prosecution as the accused enjoys the benefit of the presumption of innocence." To give effect to that standard and burden, "The Appeals Chamber agrees with the test adopted by the Trial Chamber according to which, when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence." See also, e.g. *Prosecutor v. Strugar*, IT-01-42-T, Trial Judgment, 31 January 2005, para. 333 ("The standard of proof dictates, of course, that it be the only reasonable inference from the evidence"); *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 8.

⁶⁴ Decision, para. 205 (emphasis added); see also paras. 181, 201 and 204(v).

found that it was “reasonable to infer—among other things—that Omar Al Bashir possessed the intent to destroy the ethnic group.”⁶⁵

33. However, because it applied an erroneous legal standard, the Majority declined to authorize arrest based on what it implicitly acknowledged is a reasonable inference.⁶⁶ Instead, it dismissed a number of the factors presented by the Prosecution on the basis that there may be other reasonable inferences which could also be drawn (i.e. other than the genocidal intent of President Al Bashir) from the relevant evidence.
34. The Majority explained that a) “a variety of other plausible reasons” could explain President Al Bashir’s strategy of concealing the crimes;⁶⁷ b) the hindrance by the GoS of medical and other humanitarian assistance in the IDP camps “can be carried out for a variety of other reasons other than intending to destroy in whole or in part the targeted group”,⁶⁸ and c) the nature and extent of the war crimes and crimes against humanity committed by GoS forces “can reasonably be explained by reasons other than the GoS’s genocidal intent”.⁶⁹ The Majority also repeatedly required the Prosecution to show that the only reasonable conclusion is reasonable grounds to believe that President Al Bashir had genocidal intent.⁷⁰ Significantly, however, the Majority did not find that the inference urged by the Prosecution was less reasonable than the alternatives; it simply found that other plausible inferences existed and that this required rejection of the inference of genocidal intent.
35. By way of example, one factor considered by the Majority as an indicia of President Al Bashir’s genocidal intent was the widespread and systematic nature of the crimes committed, including the forcible transfer of hundreds of thousands of civilians.⁷¹ It is recalled that this forcible transfer often included expelling the population into the most inhospitable terrain, and was at times combined with the destruction of basic means of survival,⁷² such that death of a significant number was all but inevitable.⁷³ Such evidence in addition to the later decision to provide no meaningful assistance to those forcibly displaced and to hinder the humanitarian assistance provided by the international organizations form a powerful basis from which one could conclude an intent to destroy the group, at least in part.

⁶⁵ Dissenting Opinion, para. 76; see also para. 84, “the evidence discussed above demonstrates that the possession of genocidal intent is one reasonable inference to be drawn from the available evidence. As previously explained, this inference need not be the only reasonable one at this stage. Indeed, as noted by the Majority, there are also reasonable grounds to believe that the evidence presented supports various alternative conclusions.” Judge Ušacka went on to find that there were reasonable grounds to believe that each of the pleaded *actus reus* of genocide had been committed (paras. 93, 96 and 102).

⁶⁶ See para. 3, above, and para. 58, below.

⁶⁷ Decision, paras. 165 and 204(i).

⁶⁸ Decision, para. 181.

⁶⁹ Decision, paras. 201 and 204(v).

⁷⁰ Decision, paras. 195, 201 and 205.

⁷¹ Decision, para. 192(iv), see further paras. 99–100.

⁷² Decision, para. 93. See further Prosecution Application, paras. 174–176.

⁷³ Prosecution Application, paras. 388–389; see also paras. 177–178.

36. Regardless of whether an intent to destroy the group is the only reasonable inference available based on this evidence, it is at a minimum a reasonable inference that could be drawn. The Majority's dismissal of this evidence, on the basis that "the existence of reasonable grounds to believe that the GoS acted with genocidal intent is not the only reasonable conclusion" thus demonstrates its failure to properly apply the standard in Article 58.

(iii) At the arrest warrant stage, it is sufficient if the inference of genocidal intent drawn from the evidence is reasonable; there is no requirement that the inference be the only one available

37. The correct application of the Article 58 standard of "reasonable grounds to believe" to a finding based on inference is that the inference to be drawn from the evidence presented must be reasonable, i.e. that the evidence provide a reasonable basis from which an objective observer could draw such an inference.⁷⁴ This standard does not exclude that other reasonable inferences may also be available on the evidence. Rather, the standard only requires that the inference that the person committed the crime be objectively reasonable.
38. As the Appeals Chamber has stated, when interpreting a provision a Chamber must look first and foremost to its ordinary language, read in context.⁷⁵ Under Article 58, the information or evidence presented by the Prosecution must provide reasonable (not conclusive or definitive) grounds to believe that the person committed a crime within the jurisdiction of the Court. As a result, and as held by Judge Ušacka, when the Prosecution alleged that the evidence supports an inference that the suspect had the relevant intent, that inference must be reasonable and there must be no other evidence which would render the inference unreasonable.⁷⁶ The Chamber must thus be satisfied, having considered all of the relevant evidence, that the Application provides a basis from which it is reasonable to believe, based on the directly and inferentially proven facts, that the conduct attributed to the person fulfils the relevant elements of the crime.
39. However, the standard which the Majority applied as to inferential facts effectively required that they be established beyond reasonable doubt. Notably, the Chamber's standard is not applicable to other evidence presented in support of an arrest warrant: for example, if the Prosecution establishes by other evidence that the suspect was given information, it is not required to prove the absence of any information contradicting that fact.

⁷⁴ The material presented also must not contain any evidence which would render the inference unreasonable, as noted by Judge Ušacka: see Dissenting Opinion, paras. 33–34.

⁷⁵ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 33; see also *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-573 OA6, 9 June 2008, para. 5; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para 55–56.

⁷⁶ Dissenting Opinion, paras. 32–33. The Prosecution notes that whether this is seen as two considerations or as a single holistic assessment, the outcome remains the same: the Chamber must be satisfied that, having considered all of the relevant material, that material provides a basis from which it is reasonable to infer (i.e. to believe based on inference) that the person fulfils the relevant elements of the crime.

40. The Statute does not differentiate between various classes of evidence, and it provides no basis for creating or applying different standards of proof—one for direct evidence and a separate one for circumstantial evidence, from which inferences may be drawn – as the Majority did. Rather, there is only *one* standard of proof under Article 58, and it applies to any finding and to all types of evidence. An inference is simply a factual finding which is based on circumstantial or indirect evidence; in other words, it is “a deduction of fact which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that may, not must be drawn in the circumstances.”⁷⁷ Circumstantial evidence, which has the same intrinsic value as direct evidence, is assessed in the same manner and to the same standard as any other evidence.⁷⁸ Courts simply assess the

⁷⁷ *R. v. Munoz*, 205 C.C.C. (3d) 70, 2006 CarswellOnt 673, (Feb. 8, 2006) at para 24, quoting Watt, *Watt's Manual of Criminal Evidence*, (Toronto: Carswell, 2005) at p. 108.

⁷⁸ Trial Chambers of the ICTY have “not considered circumstantial evidence to be of less substance than direct evidence” -, *Prosecutor v. Brdjanin*, IT-99-36-T, Judgment, 1 September 2004, para 35; see also *Prosecutor v. Oric*, IT-03-68-T, Judgment, 30 June 2006, para 21 (referring to Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 24 October 2004, para. 3 and guideline (ix)). Their guidelines for admission of evidence have also “recognize[d] that circumstantial evidence may be necessary in order to establish an alleged fact, particularly in criminal trials such as those before this Tribunal, where there is often no eye-witness or conclusive documents relating to a particular alleged fact. The Trial Chamber does not consider circumstantial evidence to be of less value than direct evidence” (*Prosecutor v. Martić*, IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, para. 10). See further *Desert Palace, Inc v Costa*, 539 U.S. 90, 100 123 S.Ct. 2148, 2154 (U.S. Supreme Court 2003): “The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: ‘Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.’ *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n. 17, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).” See also *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127 (U.S. Supreme Court, 1954) (in criminal cases, circumstantial evidence is “intrinsically no different from testimonial evidence”). See also, *R v Puttick* (1985) 1 CRNZ 644, 647 (Court of Appeal of New Zealand): “there is no distinction either in law or logic between facts established by direct evidence and those established by inference”. *R. v. Slaney* (1985) 18 C.R.R. 332 (Supreme Court of Newfoundland, Court of Appeal, Canada), at para 14: “It is now settled that when dealing with circumstantial evidence, the burden of proof on the Crown is no higher than it is in dealing with direct evidence.” The same principle applies in many civil law systems. The commentary of the German *Criminal Procedure Code* states that “Indizienbeweis ist ein Beweis, bei dem unmittelbar entscheidungserhebliche Haupttatsachen aus Hilfstatsachen (Indizien, Beweisanzeichen) geschlossen werden. Für die Feststellung der Hilfstatsachen gilt nichts besonderes; es handelt sich keinesfalls um einen Beweis ‘minderen Werts’” (“Circumstantial evidence is evidence with which facts directly relevant facts are established by way of auxiliary facts. For the establishment of auxiliary facts no special rules apply; in no way are they considered to be proof of “lesser value”). – Pfeiffer, *StPO Strafprozessordnung Kommentar*, (Auflage, München 2005), § 261.15 p 711. Swiss courts often emphasize that “Der Indizienbeweis ist dem direkten Beweis gleichwertig” (Evidence by inference has the same value as direct evidence) – see e.g. *Decision of the Schweizerisches Bundesgericht*, 6B_297/2007/zga, 4 September 2007; *Decision of the Kantonsgericht des Kantons Obwald*, St 05/006/jo, 4 October 2005; *Decision of the Kantonsgericht von Graubünden*, SB 02 48, 29 July 2005; *Decision of the*

circumstantial evidence and determine whether it is sufficient to infer the fact to the standard of proof required.⁷⁹

41. In this sense, the Prosecution notes that direct evidence of a person's state of mind is rarely available; fact finders commonly rely on circumstantial evidence and the reasonable inferences that may be drawn. As a result, the intent and knowledge of suspects before this Court will often be proved by inference established through circumstantial evidence.⁸⁰
42. That an inference must be objectively reasonable but need not be the only reasonable inference is also consistent with the nature of an Application for an Arrest Warrant. For the issuance of an arrest warrant, the Prosecution must establish "reasonable grounds to believe" that the person has committed a crime;⁸¹ the first, and lowest, in the series of escalating standards of proof set out in the Statute.⁸² The Prosecution is not required to present its case in full and to exclude all other reasonable inferences.
43. Consequently, as Judge Ušacka observed, more than one inference may well be reasonable based on the information submitted in support of an arrest warrant, but this does not mean that the Prosecution has failed to meet its burden under Article 58.⁸³ Given the summary nature of the evidence and proceed-

Kantonsgericht von Graubünden, SF 07 4, 07 July 2007; *Decision of the Obergericht des Kantons Obwalden*, A 05/007+008/bk, 30 May 2006; see further Hauser, Schweri and Hartmann, *Schweizerisches Strafprozessrecht*, (Auflage, Basel/Genf/München 2005), § 59.14, p. 277. Spanish doctrine similarly does not consider circumstantial evidence to have less probative value, but rather notes its great significance especially in those cases where there is not direct evidence regarding the participation of the accused in the criminal conduct- Tomé García, JA., in Andre de Oliva Santos et al (eds) "*Derecho Procesal Penal*" (7th ed.) (2004) pp. 490 para. 42); indeed the Supreme Court has gone so far as to call it the "queen of evidence" in some jurisprudence (STS 1586/1999, 10 November 1999 p.3; see also STS 872/2002, 16 May 2002 p.6).

⁷⁹ For example, in a civil case, where proof is to a standard of "balance of probabilities" – a standard higher than that of merely "reasonable grounds to believe" – one simply determines whether the inference is the most probable inference, based on the circumstantial evidence presented. This is illustrated in the case of *Bradshaw v. McEwans Pty. Ltd.* (High Court of Australia, 27 April 1951, unreported; cited in *Newman's Appeal, Re*, 13 FLR 268, 27 September 1968, Courts-Martial Appeal Tribunal, at pp. 291–292). "this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged." (emphasis added). The same distinction is explained in *Cooper and Another v. Merchant Trade Finance Ltd.*, 1999 ZASCA 97, 1 Dec. 1999 (Supreme Court of Appeal of South Africa) at para 7. As the U.S. Supreme Court articulated, "we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (U.S. Supreme Court 2003).

⁸⁰ See Prosecution Application, para. 364 and authorities cited in footnote 503; see also Decision, para. 153 and Dissenting Opinion, para. 27.

⁸¹ Article 58(1)(a).

⁸² See para. 26, above.

⁸³ Dissenting Opinion, paras. 32–33.

ings, it might, for example, be reasonable to infer that a person intended that certain crimes be committed as part of an attack, or it might also be reasonable to infer that the person was only aware of a risk. In this sense, it has been held that “[c]ircumstantial evidence may give rise to a number of inferences, but if at least one inference is indicative of guilt of the crime charged, then there is a case to answer.”⁸⁴ If the inference advanced by the Prosecution “*could* be drawn, then it is of no concern to the preliminary inquiry judge that there are additional competing inferences pointing to the innocence of the accused. It is exclusively for the trier of fact to determine whether it will draw such competing inferences and what weight it will give them.”⁸⁵

(iv) Legal authorities confirm that an inference at the Article 58 stage need not be the only reasonable one

a. The prior ICC jurisprudence

44. This same Court has issued arrest warrants based on inferences that the person acted with the relevant *mens rea* and without any requirement that they be the only reasonable inference. Pre-Trial Chamber I has, for example, made findings based on inferences that there are reasonable grounds to believe the suspect intentionally contributed to the crimes and knew that the contribution would further the criminal plan of a group.⁸⁶ In no instance when making findings of reasonable grounds to believe the intent or knowledge of a suspect based on inferences in other cases did Pre-Trial Chamber I previously require or find that the inference was the only reasonable one available on the evidence.
45. The same approach was taken by Pre-Trial Chamber III, which followed Pre-Trial Chamber I’s interpretation of the “reasonable grounds to believe” standard and also drew inferences regarding the mental elements without requiring or finding that the inference was the only reasonable conclusion.⁸⁷

⁸⁴ *Smith v. HM Advocate*, 2008 HCJAC 7, at para. 15, (7 Feb. 2008)

⁸⁵ *R. v. Gillespie*, 2006 YKSC 66, 2006 CarswellYukon 121, (Dec. 15, 2006) at para 29: “the test for a committal for trial in cases where the evidence is entirely circumstantial only requires that the preliminary inquiry judge be satisfied that there is some evidence reasonably capable of supporting the inference which *the Crown* would ask the trier of fact to draw. The preliminary inquiry judge does not have to be satisfied that that is the *only* inference which can be drawn. Indeed, the evidence may give rise to other competing inferences which point to the accused’s innocence. But the preliminary inquiry judge, and equally a judge reviewing a committal for trial in these circumstances, is not to concern him or herself with whether there are such competing inferences, but only whether the inference the Crown will ask the trier of fact to draw is reasonably possible, based upon the evidence.”

⁸⁶ *Harun and Kushayb* Summons to Appear Decision, para. 88; see also para. 106. Pre-Trial Chamber I has also previously drawn similar inferences regarding the fact that certain consequences of a plan were either intended or accepted by the suspects, based on submissions and evidence from the Prosecution setting out a series of factors which indicated such intent or acceptance: see e.g. *Prosecutor v Katanga*, ICC-01/04-01/07-4, 6 July 2007, para. 57; *Prosecutor v Ngudjolo*, ICC-01/04-02/07-3 / ICC-01/04-01/07-262, 6 July 2007, para. 58.

⁸⁷ *Bemba* Arrest Warrant Decision, para. 80; see also paras. 74, 82, 83.

46. It is, moreover, reasonable that the Pre-Trial Chambers made those inferences. To do otherwise, and to require that the Prosecution prove that reasonable inferences are the only inferences that may be drawn, would require a level of proof impossible to meet in these cases at the arrest warrant stage. Requiring excessive evidence or direct proof at the arrest warrant stage, when the suspect is still at large and when their detention may be required “to ensure that the person does not obstruct or endanger the investigation”,⁸⁸ could well endanger the lives of prospective witnesses. For example, in the current case, there are public reports that President Al Bashir’s forces attack and torture persons suspected of cooperating with the Prosecution.⁸⁹

b. The Ad-Hoc Tribunals

47. The Majority did not provide any reasoning for the test which it created. It referred to judgments of the ICTY and ICTR cited in the Prosecution’s Application for Arrest Warrant.⁹⁰ Those judgments, however, stand only for the propositions that genocidal intent may be inferred from circumstantial evidence, and that for conviction based on circumstantial evidence, the inference must be the only reasonable one available. They do not support the majority’s importation of that standard to the arrest stage.⁹¹ As Judge Ušacka acknowledges,⁹² the Prosecution clarified this critical point in its Application⁹³ and subsequently.⁹⁴

⁸⁸ Article 58(1)(b)(ii); see Decision, paras. 233–234.

⁸⁹ See e.g. Sudan Tribune, “Sudan tries a man accused of spying for the ICC”, 23 December 2008, DAR-OTP-0164-0398; BBC News, “Sudanese ‘war crimes spy’ jailed,” 28 January 2009, DAR-OTP-0164-0427; UNMIS Media Monitoring Report (<http://www.unmis.org/English/2008Docs/mmr-dec30.pdf>), 30 December 2008; Human Rights Watch, “It’s an Everyday Battle” (<http://www.hrw.org/en/node/80840/section/6>) 18 February 2009; Sudan Tribune, “Three Human Rights Activists Arrested in Sudan”, 26 November 2008, (<http://www.sudantribune.com/spip.php?article29393>).

⁹⁰ Decision, para. 153–156, referring to Prosecution Application, paras. 365–366.

⁹¹ Decision para. 160 and fns 177 and 178. See *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, 22 March 2006, paras. 53 and 55; *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Judgement, 25 February 2004, paras. 120 and 128; *Prosecutor v. Strugar*, IT-01-42-T, Trial Judgement, 31 January 2005, para. 333 (quoting the above paragraph of the Appeals Judgement in *Vasiljević*); *Prosecutor v. Seromba*, ICTR-01-66-A, Appeals Judgement, 12 March 2008, para. 176 (referencing to *Prosecutor v. Nahimana*, ICTR-99-52-A, Appeals Judgement 28 November 2007, paras. 524–525; and *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Appeals Judgement, 7 July 2006, paras. 40 and 41); *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September 1998, paras. 523, 462 and 673; and *Prosecutor v. Kayishema*, ICTR-95-1-T, Trial Judgement, 21 May 1999, paras. 93–94 and 521.

⁹² Dissenting Opinion, paras. 28–34.

⁹³ The Prosecution stated that this jurisprudence set out the evidentiary standard for proof beyond a reasonable doubt and submitted that “for the purpose of an Art. 58 application the lower standard of reasonable grounds will instead be applicable.” See Prosecution Application, footnote 505.

⁹⁴ ICC-02/05-T-2-Conf-Exp, p. 63, lines 1–12; see Application for Leave to Appeal, para. 17.

48. A detailed review of the jurisprudence of the ICTY and ICTR confirms that prior to a final judgment, inferences do not need to be the only reasonable conclusion. At earlier stages of proceedings, chambers of the ICTY and ICTR have readily drawn any inferences that they deem reasonable based on the material before them. For example, they considered that a chamber should “make any reasonably possible inferences”⁹⁵ in determining whether the evidence is insufficient to sustain a conviction at the end of the Prosecution’s case under Rule 98 *bis*.⁹⁶ The direct reliance by the Pre-Trial Chamber on the tests used in final judgments of the ad-hoc tribunals (in which findings were made beyond reasonable doubt) while simultaneously overlooking the approach of those tribunals to inferences at earlier stages of the proceedings, applying lower standards of proof, is further demonstrative of the Chamber’s error.

c. The jurisprudence of the European Court of Human Rights

49. The jurisprudence of the ECHR cited in the Decision and regularly relied upon by Pre-Trial Chambers in interpreting Article 58⁹⁷ confirms that an inference for the purposes of issuing an arrest warrant does not need to be the only reasonable conclusion. The analogous standard in the ECHR, “reasonable suspicion,” requires “the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence.”⁹⁸ Proof of reasonable grounds to believe or reasonable suspicion thus does not require proof that the inference is the only reasonable one.

⁹⁵ *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98 *bis*, 22 May 2007, para. 2. Other chambers have similarly held that they are “entitled to any inferences or presumptions which a reasonable trier of fact could make” – *Prosecutor v. Bagosora et al.*, ICTR-98-41-7, Decision on Motions for judgment of acquittal, 2 February 2005, para. 10, citing *Prosecutor v. Kvočka et al.*, Decision on Defence Motions for Acquittal, 15 December 2000, para. 13.

⁹⁶ “The test applied [at the Rule 98 *bis* stage] is whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question” *Prosecutor v. Jelusic*, IT-95-10-A, Judgement, 5 July 2001, para. 37 (emphasis added). The determinations that a suspect should be committed for trial, and subsequently that he or she has a case to answer, “are more onerous” than decisions which authorise the arrest of a person – Hunt, “The Meaning of a ‘prima facie case’ for the Purposes of Confirmation” in May et al (eds) *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer, 2001), 135 at 136–7.

⁹⁷ These principles are affirmed in the Decision in both the Majority (para. 32) and Dissenting (paras. 8–9) opinions. See also *Prosecutor v. Harun and Kushayb*, ICC-02/05-01/07-1-Corr, “Decision on Prosecution Application under Article 58(7) of the Statute”, 27 April 2007, para. 28 (“*Harun and Kushayb* Summons to Appear Decision”); *Prosecutor v. Bemba*, ICC-01/05-01/08-14-tENG, “Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Gombo”, para. 24 (“*Bemba* Arrest Warrant Decision”).

⁹⁸ *Bemba* Arrest Warrant Decision, para. 24, citing ECHR cases of *Fox, Campbell and Hartley v. United Kingdom*, Judgment of 30 August 1990, para. 32; *K.-F. v. Germany*, Judgment of 27 November 1997, para. 57; *Labita v. Italy*, Judgment of 6 April 2000, para. 155; *Berkday v. Turkey*, Judgment of 1 March 2001, para. 199; *O’Hara v. United Kingdom*, Judgment of 16 October 2001, para. 34). See further in *Berkday v. Turkey*, Judgment of 1 March 2001, para. 199: “L’existence

d. Relevant national practice

50. Finally, this approach is consistent with the practice in national legal systems. In national systems, when determining the existence of reasonable grounds (or an analogous standard of proof)⁹⁹ to issue a warrant or commit a person for trial, a judge must be satisfied that the relevant inference is a reasonable one having regard to all the evidence.¹⁰⁰ At this stage the judge is not required to determine that no inference other than guilt can be drawn where more than one inference is available:¹⁰¹ “Where ‘more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered.’ [. . .] If there are competing inferences, these are for the trier of fact to resolve. A preliminary inquiry judge commits jurisdictional error where he weighs competing inferences or chooses among them.”¹⁰²

(v) Conclusion

51. The Majority of the Pre-Trial Chamber erred in law in holding that the Prosecution must prove that the inference that President Al Bashir had genocidal intent was the only reasonable inference available on the materials presented, and in refusing to issue a warrant of arrest in respect of the counts of genocide on that basis. The Majority did not find that the inference that President Al

de soupçons plausibles présuppose celle de faits ou renseignements propres à persuader un observateur objectif que l’individu en cause peut avoir accompli l’infraction. Elle rappelle qu’il incombe au gouvernement défendeur de lui fournir au moins certains faits ou renseignements propres à la convaincre qu’il existait des motifs plausibles de soupçonner la personne arrêtée d’avoir commis l’infraction alléguée”.

⁹⁹ In the U.S., the Supreme Court explained that “the substance of all the definitions of probable cause is a reasonable ground for belief of guilt [. . .]”. *Maryland v. Pringle*, 540 U.S. 366, 371 (U.S. Supreme Court 2003); *Brinegar v. United States*, 338 U.S. 160, 175 (U.S. Supreme Court 1949); see also *Stacey v Emery*, 97 U.S. 642, 646 (U.S. Supreme Court 1878) (no substantive difference between a warrant issued on “reasonable cause” and one on “probable cause”).

¹⁰⁰ *R. v. Franks*, 2003 SKCA 70, 2003 CarswellSask 520 (April 7, 2003) at para 41; *R. v. Munoz*, 205 C.C.C. (3d) 70, 2006 CarswellOnt 673, (Feb. 8, 2006) at para 22. An inference must be reasonable and logical -*R. v. Katwaru*, 52 OR (3d) 321, 2001 CarswellOnt 173, (Jan. 25, 2001) at para 40.

¹⁰¹ *R. v. Franks*, 2003 SKCA 70, 2003 CarswellSask 520 (April 7, 2003) at para 41. Indeed, a “preliminary inquiry judge commits jurisdictional error where he weighs competing inferences or chooses among them” -*R. v. Munoz*, 205 C.C.C. (3d) 70, 2006 CarswellOnt 673, (Feb. 8, 2006) at para. 22 citing *R. v. C. (A.)* (1999), 140 C.C.C. (3d) 164 (Ont. C.A.), at 165; *R. v. Montour*, [2002] O.J. No. 141 (Ont. C.A.) at paras. 3–5.

¹⁰² *R. v. Munoz*, 205 C.C.C. (3d) 70, 2006 CarswellOnt 673, (Feb. 8, 2006) at para 21 (quoting *R. v. Szant*, [2004] S.C.J. No. 74 (S.C.C.) at para 18, per Major J.), also at paras. 22. See further *R. v. Foster*, 76 W.C.B. (2d) 769, 2008 CarswellOnt 1144, (Feb. 21, 2008) at para 31(8). As noted above, even when considering whether to commit a person to trial, once the reasonable basis for an inference of guilt has been established then it “is of no concern to the preliminary inquiry judge that there are additional competing inferences pointing to the innocence of the accused. It is exclusively for the trier of fact to determine whether it will draw such competing inferences and what weight it will give them” -*R. v. Gillespie*, 2006 YKSC 66, 2006 CarswellYukon 121, (Dec. 15, 2006) at para 10.

Bashir had genocidal intent was unreasonable, but rather based its findings on the fact that other inferences also existed. The correct approach is that taken by Judge Ušacka: namely that the inference must be reasonable based on the evidence presented by the Prosecution. And as confirmed by Judge Ušacka, the application of this proper standard of proof to the evidence presented by the Prosecution would have resulted in the issuance of a warrant for the genocide counts.¹⁰³

RELIEF SOUGHT: THE APPEALS CHAMBER SHOULD APPLY THE CORRECT LEGAL STANDARD TO THE FACTUAL CONCLUSIONS OF THE PRE-TRIAL CHAMBER

52. For the reasons set out above, the Prosecution submits that the Majority of the Pre-Trial Chamber erred in considering that a reasonable inference of intent is inadequate for a decision under Article 58, and in requiring that any such reasonable inference be the only one available. This error rendered the Chamber's refusal to authorise arrest on the genocide charges unsound.¹⁰⁴
53. In this case, the Prosecution submits that the Appeals Chamber should, on the basis of the facts found by the Pre-Trial Chamber, determine that there are reasonable grounds to believe that President Al Bashir is criminally responsible for the three counts of genocide and remand the case to the Pre-Trial Chamber with direction to authorize the arrest of President Al Bashir for genocide. The Appeals Chamber has the power to do so and it has before it all the relevant material and information. Moreover, in the instant case a factual finding by the Appeals Chamber would serve the interests of justice.

(i) The power of the Appeals Chamber to enter a finding of fact

54. Pursuant to Article 83(2) and Rule 158(1), the Appeals Chamber has the authority to substitute a discretionary decision of another Chamber with its own.¹⁰⁵ As long as the Appeals Chamber has before it all the relevant materials and information, it has the discretion to determine the issue rather than remitting the case back to the Pre-Trial or Trial Chamber. Such a decision would be consistent with the issue of finality which is attached to the appeals process under Rule 158(1).¹⁰⁶ For instance, the Appeals Chamber of the ICTY, having

¹⁰³ Dissenting Opinion, para. 84.

¹⁰⁴ The Prosecution recalls that Judge Ušacka considered that when the proper standard of proof was applied, and the proper factors were considered, the evidence presented did establish reasonable grounds to believe the Bashir had committed genocide – Dissenting Opinion, paras. 84, 105.

¹⁰⁵ *Situation in the DRC*, ICC-01/04-169, 13 July 2006, para. 91; *Situation in the DRC*, ICC-01/04-169, 13 July 2006, Dissenting Opinion Judge Pikis, para. 46.

¹⁰⁶ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-522 OA3, 27 May 2008, Judge Pikis Dissenting Opinion, para. 2. *Situation in the DRC*, ICC-01/04-169, 13 July 2006, Dissenting Opinion Judge Pikis, paras. 44–48. See also Staker, "Article 83" in Triffterer (ed) *Commentary on the Rome Statute of the ICC (2nd ed)* (2008), p. 1483.

concluded that a Trial Chamber had adopted the wrong legal standard with respect to the relevant mode of liability, applied “the correct legal framework to the factual conclusions of the Trial Chamber” and found the accused guilty under another mode of liability.¹⁰⁷

(ii) The factual basis for a finding by the Appeals Chamber

55. For the Appeals Chamber to enter a finding on whether there are reasonable grounds to believe that President Al Bashir bears criminal responsibility for the three genocide charges, there is no need in the instant case to re-consider the evidence that was before the Pre-Trial Chamber. The Appeals Chamber may make such a finding based on the relevant facts that have already been accepted as established by the Pre-Trial Chamber.¹⁰⁸ In so doing, the Appeals Chamber may, if it considers so appropriate, independently evaluate the relevance and the weight to be given to these facts and draw its own conclusion from them.¹⁰⁹
56. The factual findings of the Pre-Trial Chamber in support of the first element of each of the genocide charges (the perpetrator killed/caused serious bodily or mental harm to/ inflicted certain conditions of life upon one or more persons) are to be found among others in the following paragraphs of the Decision:
 - paragraphs 94, 97 and 192(ii) (killing);
 - paragraphs 108, 192 (iii) (causing serious bodily or mental harm through the acts of rape);
 - paragraphs 104, 192 (v) (causing serious bodily or mental harm through the acts of torture);
 - paragraphs 100, 192 (iv) (causing serious bodily or mental harm through the acts of forcible transfer);
 - paragraphs 77, 93, 97, 100–101, 104, 108, 180, 181, 184–189, 192 (inflicting conditions of life).
57. The factual findings in support of the second element of each of the genocide charges (such person or person belonged to a particular national, ethnical,

¹⁰⁷ *Prosecutor v. Stakic*, IT-97-24-A, Appeals Judgement, 22 March 2006, paras. 62–63, 85 and 98. See also *Prosecutor v. Jelusic*, IT-95-10-A, Appeals Judgement, 5 July 2001, where the Appeals Chamber found that the Trial Chamber had applied the wrong legal standard when assessing the evidence to establish the special intent for genocide at the Rule 89 *bis* stage. In this case the Appeals Chamber substituted the finding of the Trial Chamber, ruling that a re-trial was not “in the interests of justice (paras. 39, 56 and 77).

¹⁰⁸ The Majority took the same approach, when examining whether Al Bashir’s genocidal intent can be inferred “from the facts proven by the Prosecutor” (Decision, para. 205; Decision Granting Leave, p. 7). In so doing, the Appeals Chamber may consider all those facts that have not been rejected by the Majority for lack of evidence.

¹⁰⁹ For instance, the Appeals Chamber may consider specific facts to which the Majority has not given any weight (see for instance Decision para. 173–176). It may also decide not to give any weight to other facts that have been considered by the Pre-Trial Chamber in the Decision (see for instance decision paras. 196–200).

racial or religious group) are to be found among others in paragraphs 136–137 and 192 of the Decision.¹¹⁰

58. With respect to the third element of each of the genocide charges (the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such), the Prosecution submits that from an individual and collective assessment of the facts established by the Prosecution it must be inferred that there are reasonable grounds to believe that President Al Bashir acted with genocidal intent. The Prosecution stresses that at no point in the Decision did the Majority conclude that the inference that the GoS acted with genocidal intent was an unreasonable one. Rather, the Majority determined that it was not the *only* reasonable inference that can be drawn from individual factors established by the Prosecution,¹¹¹ or from a collective assessment of its factual findings.¹¹² Implicit in this finding by the Majority is that it is reasonable to infer that President Al Bashir had genocidal intent. This, the Prosecution submits, is in fact what is required to issue a warrant of arrest.
59. In addition, the Majority made findings that: a) President Al Bashir acted with discriminatory intent against members of the Fur, Masalit and Zaghawa groups;¹¹³ b) President Al Bashir made public statements that provide evidence for his responsibility for war crimes and crimes against humanity that were a core component of the GoS counter-insurgency campaign;¹¹⁴ c) Ahmad Harun, a Senior Member of the GoS who was entrusted among other things with the task of acting as a link between the government of the three Darfurian States and the highest level of the GoS, made public statements that “contain the harsher language used by GoS officials”;¹¹⁵ d) President Al Bashir and other high ranking Sudanese political and military leaders shared a common plan to carry out this counter-insurgency campaign;¹¹⁶ e) a core component of the GoS counter-insurgency campaign was the unlawful, discriminatory and systematic attack on the part of the civilian population of Darfur—belonging largely to the Fur, Masalit and Zaghawa groups—which was perceived by the GoS as being close to groups, such as the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing conflict in Darfur;¹¹⁷ f) President Al Bashir was in full control of the “apparatus” of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, and directed the branches of the “apparatus” to play an essential role in the implementation of the common plan;¹¹⁸ g) the GoS carried out numerous unlawful attacks,

¹¹⁰ See also paras 76, 83, 85, 94, 100–101, 104, 108, 191, 215.

¹¹¹ See for instance the particular seriousness of war crimes and crimes against humanity committed by the GoS force Decision (paras. 201 and 204(v)) and acts of hindrance of humanitarian assistance, as well as cutting off supplies of food and other essential goods (para. 181).

¹¹² Decision, para. 205.

¹¹³ Decision, paras. 167, 172 and 204(vi).

¹¹⁴ Decision, paras. 170–172.

¹¹⁵ Decision, paras. 173–174 and 220.

¹¹⁶ Decision, paras. 214–215.

¹¹⁷ Decision, paras. 74–76, 83, 85, 191 and 214–215.

¹¹⁸ Decision, paras. 216–219 and 222.

followed by systematic acts of pillage, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups;¹¹⁹ h) the GoS subjected thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of murder, as well as to acts of extermination;¹²⁰ i) the GoS subjected thousands of civilian women, belonging primarily to the said groups to acts of rape both in the context of the attacks, as well as in and around the IDP camps;¹²¹ j) the GoS subjected hundreds of thousands of civilians belonging primarily to the said groups to acts of forcible transfer, and encouraged members of other tribes which were allied with the GoS, to resettle in the villages and lands previously inhabited by members of these groups;¹²² k) the GoS subjected civilians belonging primarily to the said groups to acts of torture;¹²³ l) the GoS engaged in acts of hindrance of medical and other humanitarian assistance in the IDP Camps in Darfur, among others by subjecting the aid to bureaucratic barriers and difficulties in accessing a number of areas, which is explained in some reports by the GoS's attempt to hide the magnitude of the crisis;¹²⁴ and m) at times, GoS forces contaminated

¹¹⁹ Decision, paras. 77 and 192(i).

¹²⁰ Decision, paras. 94, 97 and 192(ii).

¹²¹ Decision, paras. 108 and 192(iii). Although the Majority found that there are no reasonable grounds to believe "that Janjaweed militiamen were stationed around IDP Camps for the purpose of raping those women and killing those men who ventured outside the camps" (para. 199), for the purpose of its findings that thousands of rapes occurred, the Majority relied on incidents of rape in or around the IDP camps: See UN General Assembly, Human Rights Council, Human Rights Situations that Require the Council's Attention (A/HRC/7/22), 3 March 2008 (Anx J28) at DAR-OTP-0148-0259 at 0270, para. 47, which states as follows: "The female population of Darfur, in particular internally displaced persons continue to be the target of rape and other sexual and gender-based violence. The established pattern of violence against women that emerged at the beginning of the conflict continued during the reporting period. As documented in many previous incidents, the perpetrators were very often armed men in military uniforms or in civilian clothes travelling in groups on horses or camels. In North Darfur, internally displaced persons were victims in 80 per cent of all reported cases of sexual and gender-based violence. Female internally displaced persons were usually attacked when they left the confines of the camps for internally displaced persons to engage in income-gathering activities, such as the collection of firewood, grass and fruit." See also Witness Statement, (Anx 66) DAROTP-0119-0711 at 0718, para. 36, according to which "the villagers were trapped in Kailek for around 2 months. [...] the women and girls were raped on a daily basis. In 2005 as part of the SOAT collection project I interviewed 3 or 4 women/girls who had been raped in Kailek and had given birth to 'Janjaweed babies' in Kalma IDP camp. I also learnt that there were hundreds of women and girls who had become pregnant following forced sexual intercourse in Kailek and some women/girls had died as a result of the brutality of the rape". See further the evidence on rape at the Kalma camp accepted by the Majority at para. 180 of the Decision.

¹²² Decision, paras. 100–101 and 192(iv). The Majority referred to an estimate of the United Nations, according to which the number of IDPs is as high as 2.7 million (paras. 179 and 204(ii)).

¹²³ Decision, paras. 104 and 192(v).

¹²⁴ Decision, paras. 181, 185–189.

the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked.¹²⁵

60. The Prosecution submits that these facts as found by the Pre-Trial Chamber amply support reasonable grounds from which to infer that President Al Bashir acted with genocidal intent.
61. Finally, the factual findings in support of the fourth element of each of the genocide charges (the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction) are to be found in paragraphs 83–85, 88 of the Decision.¹²⁶

(iii) A factual finding by the Appeals Chamber is in the interest of justice

62. Having determined the correct legal standard, and given that the facts relevant to the issue are uncontested, the Appeals Chamber is in as good a position as the Pre-Trial Chamber to draw conclusions from them.¹²⁷ In addition, the remedy sought is intrinsically linked to the appealed issue,¹²⁸ which is a discrete and self-contained question. Moreover, a determination of the issue by the Appeals Chamber in the instant case does not require that the Appeals Chamber has “daily control of the case and a full awareness of the complete factual background”.¹²⁹ Given the early stage of this case (issuance of an arrest warrant), there has been no litigation between the parties. The Appeals Chamber thus has before it all the necessary factual background, putting it in a position to apply the correct legal standard—if it so finds—to the undisputed facts set out by the Pre-Trial Chamber.¹³⁰
63. The Prosecution submits that in the instant case it is in the interest of justice that the Appeals Chamber exercise its discretionary power and find that there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for the three counts of genocide included in the Prosecution Application. The Appeals Chamber may take a decision on the issue expeditiously, without there being any need to a further assessment of evidence or facts by the Pre-Trial Chamber.
64. Should the Appeals Chamber conclude that it would not be appropriate to enter itself a finding of reasonable grounds, then the Prosecution requests that the Chamber, after reversing the Decision and determining the correct standard, remand the matter to the Pre-Trial Chamber for a new determination under Article 58.

¹²⁵ Decision, para. 93. The Pre-Trial Chamber found that there are no reasonable grounds to believe that such a contamination was a core feature of their attack.

¹²⁶ See also paras. 76, 94, 97, 100, 108, 191–192, 215.

¹²⁷ *Situation in the DRC*, ICC-01/04-169, 13 July 2006, Dissenting Opinion Judge Pikis, para. 46.

¹²⁸ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-475, para. 111, and *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-522, OA3, 27 May 2008, para. 65.

¹²⁹ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-522 OA3, 27 May 2008, paras. 65 and 69.

¹³⁰ *A contrario*, *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-475, para. 111.

(iv) Relief Sought

65. The Prosecution therefore respectfully requests that the Appeals Chamber:

- overturn the Decision to the extent that it held the Prosecution had not established reasonable grounds to believe that President Omar Al Bashir had genocidal intent;
- set out the correct standard for drawing inferences under Article 58; and
- apply that correct standard to the facts found by the Pre-Trial Chamber, entering a finding that there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for genocide under Articles 6(a), (b) and (c) of the Statute, and
- direct the Pre-Trial Chamber to issue a warrant of arrest on those counts; or in the alternative,
- remand the matter to the Pre-Trial Chamber to decide on whether there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for genocide under Articles 6(a), (b) and (c) of the Statute, applying the correct standard.

A handwritten signature in black ink, appearing to read 'Luis Moreno-Ocampo', with a long, sweeping horizontal line extending to the left.

Luis Moreno-Ocampo,

Prosecutor

Dated this 6th day of July 2009

At The Hague, The Netherlands

DOCUMENT 8

On February 3, 2010, after considering the ICC Prosecutor's Appeal regarding the Pre-Trial Chamber I Majority Decision to not issue a warrant of arrest against Sudanese President Omar al Bashir for the crime of genocide, the ICC Appeals Chamber rendered its decision. In doing so, it reversed the Majority decision due to basing its (the Majority's) decision on "an erroneous standard of proof." Accordingly, the ICC Appeals Chamber ordered Pre-Trial Chamber I to "decide anew, on the basis of the correct standard of proof, whether a warrant of arrest in respect of the crime of genocide should be issued." Continuing, the Appeals Chamber asserted that "A Pre-Trial Chamber acts erroneously if it denies to issue a warrant of arrest under article 58 (1) of the Statute on the basis that 'the existence of [...] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution.' The Pre-Trial Chamber not only developed an erroneous standard regarding 'proof by inference', but actually applied this standard to the evidence put forward by the Prosecutor in respect of Mr. Al Bashir's alleged genocidal intent."

The Appeals Chamber's decision did not mean that Pre-Trial Chamber I Judges had to issue a warrant charging al Bashir with genocide, but only that it was incumbent upon them to review the ICC Prosecutor's application and render a decision that applied sound legal procedures and correct standards.

This document is important in that it provides insights into the legal complexities surrounding ICC decisions vis-à-vis the issue of genocide, and what is involved in attempting to hold an alleged perpetrator responsible for crimes of genocide.

JUDGMENT ON THE APPEAL OF THE PROSECUTOR AGAINST THE DECISION ON THE PROSECUTION'S APPLICATION FOR A WARRANT OF ARREST AGAINST OMAR HASSAN AHMAD AL BASHIR, INTERNATIONAL CRIMINAL COURT, FEBRUARY 3, 2010

THE APPEALS CHAMBER

**Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song**

Judge Ekaterina Trendafilova
Judge Daniel David Ntanda Nsereko
Judge Joyce Aluoch

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad al Bashir” of 4 March 2009 (ICC-02/05-01/09-2-Conf),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad al Bashir” is reversed to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the crime of genocide in view of an erroneous standard of proof. The Pre-Trial Chamber is directed to decide anew, on the basis of the correct standard of proof, whether a warrant of arrest in respect of the crime of genocide should be issued.

REASONS

I. Key Finding

1. A Pre-Trial Chamber acts erroneously if it denies to issue a warrant of arrest under article 58 (1) of the Statute on the basis that “the *existence* of [...] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution”.¹

¹ “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad al Bashir”, ICC-02/05-01/09-2-Conf, 4 March 2009, para. 159 (emphasis added).

II. Procedural History

A. *Proceedings Before the Pre-Trial Chamber*

2. On 14 July 2008, the Prosecutor filed before Pre-Trial Chamber I an application² under article 58 of the Statute, requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad Al Bashir for his alleged criminal responsibility in the commission of genocide, crimes against humanity, and war crimes against members of the Fur, Masalit and Zaghawa groups in Darfur from March 2003 to July 2008 (hereinafter: "Arrest Warrant Application").
3. On 4 March 2009, the Pre-Trial Chamber rendered the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"³ (hereinafter: "Impugned Decision"). The Pre-Trial Chamber decided to issue an arrest warrant in respect of crimes against humanity and war crimes,⁴ but rejected the Prosecutor's application in respect of the crime of genocide.⁵
4. On 13 March 2009, the Prosecutor filed the "Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'"⁶ dated 10 March 2009 (hereinafter: "Application for Leave to Appeal"), requesting leave to appeal the Impugned Decision in respect of three issues.
5. On 24 June 2009, the Pre-Trial Chamber rendered the "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'"⁷ (hereinafter: "Decision Granting Leave to Appeal"), granting the Application for Leave to Appeal in respect of one of the issues and rejecting the remainder of the application.⁸ The issue in respect of which leave to appeal was granted reads as follows:

Whether the correct standard of proof in the context of Article 58 requires that the only reasonable conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.⁹

² "Prosecutor's Application under Article 58", ICC-02/05-151-US-Exp; "Corrigendum to Prosecution's Application under Article 58 filed on 14 July 2008", ICC-02/05-151-US-Exp-Corr. A public redacted version was filed on 12 September 2009 under the number ICC-02/05-157-AnxA.

³ ICC-02/05-01/09-2-Conf A public redacted version was filed under the number ICC-02/05-01/09-3. In the present judgment, references are to the public redacted version.

⁴ Impugned Decision, p. 92.

⁵ Impugned Decision, para. 206.

⁶ ICC-02/05-01/09-12.

⁷ ICC-02/05-01/09-21.

⁸ Decision Granting Leave to Appeal, p. 10.

⁹ Decision Granting Leave to Appeal, p. 5.

B. Proceedings on Appeal

6. On 2 July 2009, the Prosecutor filed the "Prosecution Request for an Extension of the Page Limit for its Document in Support of the Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'"¹⁰, in which the Prosecutor requested an extension of the page limit for his document in support of the appeal pursuant to regulation 37 (2) of the Regulations of the Court. The Appeals Chamber granted the Prosecutor's request on 3 July 2009.¹¹
7. On 6 July 2009, the Prosecutor filed the "Prosecution Document in Support of Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'"¹² (hereinafter: "Document in Support of the Appeal").
8. On 20 July 2009, the Sudan Workers Trade Unions Federation (hereinafter: "SWTUF") and the Sudan International Defence Group (hereinafter: "SIDG") filed an application for leave to make observations on the appeal under rule 103 of the Rules of Procedure and Evidence (hereinafter: "Application under Rule 103"),¹³ which the Prosecutor opposed.¹⁴ On 18 September 2009, the Appeals Chamber granted the Application under Rule 103.¹⁵ The reasons for that decision were filed on 9 November 2009.¹⁶ On 25 September 2009, the SWTUF and SIDG submitted their "Observations on behalf of Amici Curiae in respect of the Prosecution Appeal's [sic] against 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'"¹⁷ (hereinafter: "Observations"). On 2

¹⁰ ICC-02/05-01/09-22.

¹¹ "Decision on the 'Prosecution Request for an Extension of the Page Limit for its Document in Support of Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", ICC-02/05-01/09-24.

¹² ICC-02/05-01/09-25.

¹³ "Application under Rule 103 in respect of Prosecution Appeal against 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", ICC-02/05-01/09-27, registered on 21 July 2009.

¹⁴ "Prosecution's Response to Application under Rule 103 in respect of Prosecution Appeal against 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", ICC-02/05-01/09-29, 11 August 2009. On 24 August 2009, the SWTUF and SIDG filed the "Application for Leave and Reply to the Prosecution's Response to the Application under Rule 103 in respect of Prosecutions Appeal against 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", ICC-02/05-01/09-33.

¹⁵ "Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply", ICC-02/05-01/09-43.

¹⁶ "Reasons for 'Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply'", ICC-02/05-01/09-51.

¹⁷ ICC-02/05-01/09-44.

October 2009, the Prosecutor responded to the Observations¹⁸ (hereinafter: "Response to Observations").

9. On 27 August 2009, the applicants for victim status a/0443/09 to a/0450/09 (hereinafter: "Victims") filed the "Request for an Extension of the Time Limit Prescribed in the Regulations of the Court and Observations on the Victims' Right to Participate in the Prosecution's Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir".¹⁹ The Prosecutor responded to this filing on 4 September 2009.²⁰ On 23 October 2009, the Appeals Chamber rendered the "Decision On the Applications by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir' and on the Request for an Extension of Time",²¹ instructing the Registrar to transmit the applications of the Victims to Pre-Trial Chamber I and rejecting the Victims' request for an extension of the time limit for the submission of observations in the appeal.
10. On 4 January 2010, and after having been granted victim status by Pre-Trial Chamber I,²² the Victims filed the "Second Request for Participation and Observations on the Prosecution's Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir"²³ (hereinafter: "Second Victims' Request for Participation"). On 6 January 2010, the Appeals Chamber issued an order, setting a time limit for the submission of a response by the Prosecutor to the Second Victims' Request for Participation.²⁴ The Prosecutor responded to the Second Victims' Request for Participation on 11 January 2010²⁵ (hereinafter: "Prosecutor's Response to Second Victims' Request").

¹⁸ "Prosecution Response to Observations of Amicus Curiae in respect of the Prosecution's Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", ICC-02/05-01/09-47.

¹⁹ ICC-02/05-01/09-35.

²⁰ "Prosecution's Response to Victims' Request for Extension of Time and Observations on their Right to Participation in the Prosecution's Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", ICC-02/05-01/09-39.

²¹ ICC-02/05-01/09-48.

²² See "Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case", ICC-02/05-01/09-62, dated 1 December 2009 and registered on 15 December 2009.

²³ ICC-02/05-01/09-65-Conf-Exp; a public redacted version was filed on the same day under the number ICC-02/05-01/09-65-Red.

²⁴ "Order on the Filing of a Response to the 'Second Request for Participation and Observations on the Prosecution's Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir'", ICC-02/05-01/09-66.

²⁵ "Prosecution Response to the Victims' 'Second Request for Participation and Observations on the Prosecution's Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir'", ICC-02/05-01/09-68.

11. On 28 January 2010, the Appeals Chamber granted the Victims the right to participate in the present appeal and allowed the substantive submissions made in the Second Victims' Request for Participation.²⁶

III. MERITS

A. Relevant part of the Impugned Decision

12. In the Impugned Decision, the Pre-Trial Chamber stated:

The Prosecution highlights that it relies exclusively on proof by inference to substantiate its allegations concerning Omar Al Bashir's alleged responsibility for genocide. In particular, the Prosecution relies on inferences to prove the existence of Omar Al Bashir's *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.²⁷

13. The Pre-Trial Chamber described the standard of proof that it would apply in such a situation as follows:

158. In applying the law on the proof by inference to the article 58 evidentiary standard in relation to the existence of a GoS's genocidal intent, the Majority agrees with the Prosecution in that such a standard would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS's *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.

159. As a result, the Majority considers that, if the existence of a GoS's genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met.²⁸

14. The Pre-Trial Chamber assessed the evidence presented by the Prosecutor against the standard developed in paragraphs 158 and 159 of the Impugned Decision²⁹ and concluded that "the materials provided by the Prosecution in support of the Prosecution Application fail to provide reasonable grounds to believe that the GoS acted with *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups, and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to [the crime of genocide]".³⁰

²⁶ "Decision on the Second Application by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", ICC-02/05-01/09-70.

²⁷ Impugned Decision, para. 147, (footnotes omitted).

²⁸ Impugned Decision, paras 158–159 (footnotes omitted).

²⁹ See Impugned Decision, paras 162–205.

³⁰ Impugned Decision, para. 206.

B. The Dissenting Opinion

15. Judge Ušacka filed a separate and partly dissenting opinion to the Impugned Decision³¹ (hereinafter: "Dissenting Opinion"). She underlined that the Statute provides for an increasingly demanding evidentiary threshold from the arrest warrant stage to conviction.³² She disagreed with the test adopted by the Pre-Trial Chamber, stating that it was "tantamount to requiring the Prosecution to present sufficient evidence to allow the Chamber to be convinced of genocidal intent beyond a reasonable doubt".³³ In her view, it is sufficient that the inference of genocidal intent be a reasonable one, but it is not necessary that it be the only reasonable conclusion based on the evidence.³⁴ Judge Ušacka assessed the evidence presented by the Prosecutor and concluded that the existence of genocidal intent was indeed a reasonable conclusion.³⁵ In her opinion, the Pre-Trial Chamber should have issued a warrant of arrest in respect of genocide³⁶

C. Arguments of the Prosecutor

16. In his Document in Support of the Appeal, the Prosecutor submits that he proved the genocidal intent of Mr Al Bashir before the Pre-Trial Chamber.³⁷ He argues that the Pre-Trial Chamber incorrectly required that genocidal intent be the only reasonable conclusion to be drawn on the basis of the evidence.³⁸ In the Prosecutor's view, the Pre-Trial Chamber "effectively required proof of an inference beyond reasonable doubt in order to establish 'reasonable grounds to believe' under Article 58".³⁹ The Prosecutor submits that article 58 of the Statute does not require that "a conclusion be the only reasonable conclusion. Nor is this a generic requirement for proof by inference at all stages".⁴⁰ The Prosecutor notes that although the Pre-Trial Chamber explained in the Decision Granting Leave that it had not required proof beyond reasonable doubt, the Chamber failed to explain why it nevertheless required that genocidal intent be the only reasonable conclusion.⁴¹ In the view of the Prosecutor, this amounted to the imposition of an incorrect two-stage test.⁴² The Prosecutor also contends that the Pre-Trial Chamber "implicitly acknowledged" that the inference of Mr Al Bashir's genocidal intent was reasonable.⁴³

³¹ ICC-02/05-01/09-3, pp. 96–146.

³² Dissenting Opinion, paras 7–10.

³³ Dissenting Opinion, para. 31.

³⁴ Dissenting Opinion, paras 32, 34.

³⁵ Dissenting Opinion, para. 86.

³⁶ Dissenting Opinion, para. 105.

³⁷ Document in Support of the Appeal, para. 19.

³⁸ Document in Support of the Appeal, paras 20–21.

³⁹ Document in Support of the Appeal, para. 27.

⁴⁰ Document in Support of the Appeal, para. 29.

⁴¹ Document in Support of the Appeal, para. 30.

⁴² Document in Support of the Appeal, para. 30.

⁴³ Document in Support of the Appeal, paras 32, 33

17. The Prosecutor emphasises that at the arrest warrant stage, he is not required to present his full case, but must meet only the lowest standard of proof set out in the Statute.⁴⁴ In his submission, this threshold is met if the evidence provides “reasonable (not conclusive or definitive) grounds to believe that the person committed a crime within the jurisdiction of the Court”.⁴⁵ He recalls that the Statute does not differentiate between various categories of evidence and that the test should not be different for circumstantial evidence than for direct evidence; in his view, the Court has to assess the circumstantial evidence to determine whether the requisite standard of proof is met.⁴⁶ He underlines that there will rarely be direct evidence of a person’s state of mind.⁴⁷
18. To support his argument that the Pre-Trial Chamber’s standard was erroneous, the Prosecutor refers to previous practices of this Court. He underlines that in relation to other cases, Pre-Trial Chamber I has never required that the existence of a mental element of a crime be the only reasonable conclusion to be drawn from the evidence.⁴⁸ He submits that requiring such proof might actually endanger witnesses, and that it is impossible at this stage of the proceedings to obtain proof beyond reasonable doubt.⁴⁹
19. Finally, the Prosecutor refers the Appeals Chamber to the jurisprudence of the *ad hoc* international criminal tribunals,⁵⁰ of the European Court of Human Rights,⁵¹ and to national practice,⁵² emphasising that none of these jurisdictions require at the arrest warrant stage that the existence of reasonable grounds to believe be the only reasonable conclusion that can be drawn on the basis of the evidence.
20. As to the relief sought, the Prosecutor submits that the Appeals Chamber should, on the basis of the factual findings made by the Pre-Trial Chamber, make a determination that there are reasonable grounds to believe that Mr Al Bashir has committed genocide, and should remand the matter to the Pre-Trial Chamber “with direction to authorize the arrest of President Al Bashir for genocide”.⁵³ The Prosecutor contends that the factual findings of the Pre-Trial Chamber support reasonable grounds to believe Mr Al Bashir committed the crime of genocide.⁵⁴ The Prosecutor submits that the Appeals Chamber has the power to make factual determinations, as long as it has before it the relevant information.⁵⁵ In the alternative, he requests that the Appeals Chamber should remand the matter to the Pre-Trial Chamber for a new decision.⁵⁶

⁴⁴ Document in Support of the Appeal, para. 42.

⁴⁵ Document in Support of the Appeal, para. 38.

⁴⁶ Document in Support of the Appeal, para. 40.

⁴⁷ Document in Support of the Appeal, para. 41.

⁴⁸ Document in Support of the Appeal, paras 44–45.

⁴⁹ Document in Support of the Appeal, para. 46.

⁵⁰ Document in Support of the Appeal, paras 47–48.

⁵¹ Document in Support of the Appeal, para. 49.

⁵² Document in Support of the Appeal, para. 50.

⁵³ Document in Support of the Appeal, para. 53.

⁵⁴ Document in Support of the Appeal, paras 55–61.

⁵⁵ Document in Support of the Appeal, para. 54.

⁵⁶ Document in Support of the Appeal, para. 64.

D. Observations of the SWTUF and the SIDG and response of the Prosecutor thereto

21. The SWTUF and the SIDG submit that the Pre-Trial Chamber did not err when rejecting the Prosecutor's Arrest Warrant Application in respect of the crime of genocide.⁵⁷ They underline that article 58 of the Statute stipulates that the Pre-Trial Chamber must be "satisfied" that reasonable grounds to believe exist, and that both the Pre-Trial Chamber and Judge Ušacka in her dissenting opinion noted that this standard was the test to be applied.⁵⁸ The SWTUF and SIDG accept that a different standard of proof applies at the trial level.⁵⁹ However, in their view, the Pre-Trial Chamber must be certain that the standard of reasonable grounds to believe is met, failing which the Chamber would not be "satisfied" of the standard.⁶⁰ To support their submission, the SWTUF and the SIDG refer the Appeals Chamber to previous jurisprudence of the Pre-Trial Chambers.⁶¹
22. The SWTUF and the SIDG submit furthermore that the Pre-Trial Chamber found that the Prosecutor had not presented sufficient evidence to establish reasonable grounds to believe regarding genocidal intent.⁶² The SWTUF and SIDG recall that throughout the Impugned Decision, the Pre-Trial Chamber referred to the correct standard under article 58 of the Statute.⁶³ They also emphasise that the divergence of views between the Pre-Trial Chamber and Judge Ušacka is one that relates to the assessment of the evidence and the conclusions drawn therefrom, but not to the standard itself.⁶⁴
23. The SWTUF and the SIDG submit that the Prosecutor is incorrect when he argues that the Pre-Trial Chamber implicitly accepted that there were reasonable grounds to believe that Mr Al Bashir had genocidal intent.⁶⁵ They refer the Appeals Chamber to the Pre-Trial Chamber's analysis of the evidence in the Impugned Decision,⁶⁶ underlining that the Pre-Trial Chamber did not make a finding that there were reasonable grounds to believe genocidal intent existed.⁶⁷
24. As to the appropriate relief, the SWTUF and the SIDG argue that the only issue on appeal is whether the Pre-Trial Chamber applied the correct evidentiary test when rejecting the Prosecutor's Arrest Warrant Application in respect of genocide,⁶⁸ but not whether the Pre-Trial Chamber analysed the evidence correctly.⁶⁹ In their view, if the Appeals Chamber were to conclude

⁵⁷ Observations, para. 4.

⁵⁸ Observations, paras 8–9.

⁵⁹ Observations, para. 10.

⁶⁰ Observations, para. 11.

⁶¹ Observations, paras 16–17.

⁶² Observations, para. 19.

⁶³ Observations, para. 20.

⁶⁴ Observations, para. 23.

⁶⁵ Observations, paras 27–29.

⁶⁶ Observations, paras 33–48.

⁶⁷ Observations, para. 30.

⁶⁸ Observations, paras 49, 53.

⁶⁹ Observations, para. 53.

that the Pre-Trial Chamber erred in respect of the standard of proof, the matter should be remanded to the Pre-Trial Chamber for a new decision.⁷⁰ They argue that the Appeals Chamber cannot overturn the Pre-Trial Chamber's finding without itself assessing all the evidence fully⁷¹

25. The Prosecutor refutes the submissions of the SWTUF and the SIDG, repeating many of the arguments raised in his Document in Support of the Appeal. He emphasises that article 58 (1) of the Statute does not require that there be "absolute certainty that the evidence exclude all hypotheses inconsistent with the requisite statutory elements of the alleged crime, [because] then the lower threshold showing of 'reasonable grounds' would be meaningless".⁷² The Prosecutor submits that the SWTUF and SIDG do not refer to any authority to support their view that a Pre-Trial Chamber must be certain that the standard of reasonable grounds is met, otherwise the Chamber would not be "satisfied" of the standard.⁷³ The Prosecutor insists that both the Impugned Decision and the Observations are logically flawed because they are based on the premise that reasonable grounds can only exist if they are the only reasonable conclusion,⁷⁴ and that the "only reasonable conclusion" standard is the "logical equivalent" of the "beyond reasonable doubt" standard.⁷⁵
26. The Prosecutor rejects the argument that the Pre-Trial Chamber and Judge Ušacka in her Dissenting Opinion agreed on the standard and merely assessed the evidence differently, submitting that under the Pre-Trial Chamber's standard a reasonable inference would not be sufficient to establish reasonable grounds to believe.⁷⁶ Finally, the Prosecutor submits that the argument that the Appeals Chamber cannot overturn a factual finding by the Pre-Trial Chamber unless it assesses all evidence itself is misconstrued in the context of the present appeal.⁷⁷

E. Submissions of the Victims and response of the Prosecutor thereto

27. The Victims generally support the Prosecutor's arguments on appeal.⁷⁸ In their view, the Pre-Trial Chamber developed a standard of proof that was "unduly stringent", and which was neither supported by the wording or intent of the Statute nor by precedent.⁷⁹ The Victims submit that the Pre-Trial Chamber's standard did not provide the flexibility required during the investigation stage of the proceedings.⁸⁰ They refer the Appeals Chamber to decisions of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: "ICTY"),

⁷⁰ Observations, paras 50, 53.

⁷¹ Observations, para. 51.

⁷² Response to Observations, para. 14.

⁷³ Response to Observations, para. 15.

⁷⁴ Response to Observations, para. 16.

⁷⁵ Response to Observations, para. 18.

⁷⁶ Response to Observations, para. 21.

⁷⁷ Response to Observations, para. 34.

⁷⁸ Second Victims' Request for Participation, para. 25.

⁷⁹ Second Victims' Request for Participation, para. 26.

⁸⁰ Second Victims' Request for Participation, para. 27.

which reflect a lower standard of proof,⁸¹ and which even indicate that the mental element does not have to be established at the pre-trial stage of proceedings at the ICTY.⁸² The Victims are of the view that the Pre-Trial Chamber was “involving itself in an overly critical evaluation of the evidence”.⁸³ The Victims request that the matter be remitted to the Pre-Trial Chamber for a new evaluation of the evidence, in the course of which the Pre-Trial Chamber should also take into account information supplied by two of the Victims.⁸⁴

28. The Prosecutor supports the submissions of the Victims, noting that the Victims endorse the submissions he has made in the Document in Support of the Appeal.⁸⁵ As to the Victims’ request that the Pre-Trial Chamber should take into account the information provided by two of the Victims when evaluating anew the Prosecutor’s evidence regarding genocidal intent, the Prosecutor notes that the present appeal is confined to a “precise legal matter”, and that the Victims’ submissions therefore should be disregarded.⁸⁶

F. Determination by the Appeals Chamber

29. Article 58 (1) of the Statute reads, in relevant part, as follows:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- a. There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- b. [...]

30. In the view of the Appeals Chamber, the evidentiary threshold of “reasonable grounds to believe” for the issuance of a warrant of arrest must be distinguished from the threshold required for the confirmation of charges (“substantial grounds to believe”, article 61 (7) of the Statute) and the threshold for a conviction (“beyond reasonable doubt”, article 66 (3) of the Statute). It is evident from the wording of the provisions that the standards of “substantial grounds to believe” and “beyond reasonable doubt” are higher standards of proof than “reasonable grounds to believe”. Accordingly, when disposing of an application for a warrant of arrest under article 58 (1) of the Statute, a Pre-Trial Chamber should not require a level of proof that would be required for the confirmation of charges or for conviction.
31. The Appeals Chamber notes that the Pre-Trial Chamber equated⁸⁷ the “reasonable grounds to believe” standard with the “reasonable suspicion” standard as a prerequisite for lawful arrest or detention under article 5 (1) (c) of

⁸¹ Second Victims’ Request for Participation, para. 30.

⁸² Second Victims’ Request for Participation, para. 31.

⁸³ Second Victims’ Request for Participation, para. 32.

⁸⁴ Second Victims’ Request for Participation, para. 34.

⁸⁵ Prosecutor’s Response to Second Victims’ Request, para. 24.

⁸⁶ Prosecutor’s Response to Second Victims’ Request, para. 25.

⁸⁷ See Impugned Decision, para. 160.

the European Convention on Human Rights.⁸⁸ In this context it is instructive to recall that the European Court of Human Rights has interpreted “reasonable suspicion” under article 5 (1) (c) of the European Convention on Human Rights as “presuppos[ing] the existence of facts or information which would satisfy an objective observer that the person concerned *may* have committed the offence”.⁸⁹ Thus, at this preliminary stage, it does not have to be certain that that person committed the alleged offence. Certainty as to the commission of the crime is required only at the trial stage of the proceedings (see article 66 (3) of the Statute), when the Prosecutor has had a chance to submit more evidence.

32. In the Impugned Decision, the Pre-Trial Chamber developed a specific test to determine whether “reasonable grounds to believe” have been established by way of ‘proof by inference’. The Pre-Trial Chamber stated that the “reasonable grounds” standard would be met (and a warrant would be issued) if the evidence provided by the Prosecutor “show[s] that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence” of the requisite specific genocidal intent.⁹⁰ The Chamber further explained its understanding of the applicable standard as follows:

[I]f the existence of [...] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met.⁹¹

33. In the view of the Appeals Chamber, requiring that the existence of genocidal intent must be the *only* reasonable conclusion amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt. If the only reasonable conclusion based on the evidence is the existence of genocidal intent, then it cannot be said that such a finding establishes merely “reasonable grounds to believe”. Rather, it establishes genocidal intent “beyond reasonable doubt”.
34. The Pre-Trial Chamber not only developed an erroneous standard regarding ‘proof by inference’, but actually applied this standard to the evidence put forward by the Prosecutor in respect of Mr Al Bashir’s alleged genocidal intent. Notably, in paragraph 195 of the Impugned Decision, the Pre-Trial Chamber found that:

[T]here are a number of additional factors, resulting from the materials provided by the Prosecution, that must be taken into consideration in determining whether the existence of reasonable grounds to believe that the GoS acted with genocidal intent is the *only reasonable conclusion* from the commission by

⁸⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), signed 4 November 1950, as amended by Protocol 11, entered into force 3 September 1953, 213 United Nations Treaty Series 2889.

⁸⁹ European Court of Human Rights, *Fox, Campbell and Hartley v. United Kingdom*, “Judgment”, Application no. 12244/86, 12245/86, 12383/86, 30 August 1990, para. 32 (emphasis added).

⁹⁰ Impugned Decision, para. 158.

⁹¹ Impugned Decision, para. 159 (emphasis added).

GoS forces, in a widespread and systematic manner, of the above-mentioned war crimes and crimes against humanity.⁹²

35. The “number of additional factors” to be considered by the Pre-Trial Chamber were subsequently evaluated in paragraphs 196 to 200 of the Impugned Decision.
36. The Pre-Trial Chamber summed up its analysis of the Prosecutor’s evidence as follows:

204. In this regard, the Majority recalls that the above-mentioned analysis of the Prosecution’s allegations concerning the GoS’s genocidal intent and its supporting materials has led the Majority to make the following findings:

- i. even if the existence of an alleged GoS strategy to deny and conceal the crimes committed in Darfur was to be proven, there can be a variety of plausible reasons for its adoption, including the intention to conceal the commission of war crimes and crimes against humanity;
- ii. the Prosecution’s allegations concerning the alleged insufficient resources allocated by the GoS to ensure adequate conditions of life in IDP Camps in Darfur are vague in light of the fact that, in addition to the Prosecution’s failure to provide any specific information as to what possible additional resources could have been provided by the GoS, there existed an ongoing armed conflict at the relevant time and the number of IDPs, according to the United Nations, was as high as two million by mid 2004, and as high as 2.7 million today;
- iii. the materials submitted by the Prosecution in support of the Prosecution Application reflect a situation within the IDP Camps which significantly differs from the situation described by the Prosecution in the Prosecution Application;
- iv. the materials submitted by the Prosecution in support of the Prosecution Application reflect a level of GoS hindrance of medical and humanitarian assistance in IDP Camps in Darfur which significantly differs from that described by the Prosecution in the Prosecution Application;
- v. despite the particular seriousness of those war crimes and crimes against humanity that appeared to have been committed by GoS forces in Darfur between 2003 and 2008, a number of materials provided by the Prosecution point to the existence of several factors indicating that the commission of such crimes can reasonably be explained by reasons other than the existence of a GoS’s genocidal intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups;
- vi. the handful of GoS official statements (including three allegedly made by Omar Al Bashir himself) and public documents relied upon by the Prosecution provide only indicia of a GoS’s persecutory intent (as opposed to a genocidal intent) against the members of the Fur, Masalit and Zaghawa groups; and
- vii. as shown by the Prosecution’s allegations in the case of The Prosecutor v. Ahmad Harun and Ali Kushayb, the Prosecution has not found any indicia of genocidal intent on the part of Ahmad Harun, in spite of the fact that the harsher language contained in the above-mentioned GoS official statements and documents comes allegedly from him.⁹³

⁹² Emphasis added.

⁹³ Impugned Decision, para. 204.

37. The Pre-Trial Chamber stated:

[W]hen all materials provided by the Prosecution in support of the Prosecution Application are analysed together, and consequently, the above-mentioned findings are jointly assessed, the Majority cannot but conclude that the existence of reasonable grounds to believe that the GoS acted with [genocidal] intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups *is not the only reasonable conclusion* that can be drawn therefrom.⁹⁴

38. Based on this conclusion, the Pre-Trial Chamber found “that the materials provided by the Prosecution [...] fail to provide reasonable grounds to believe that the GoS acted with [genocidal intent] [...], and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to [genocide] counts 1 to 3”.⁹⁵
39. The above indicates that the Pre-Trial Chamber would be satisfied that there were reasonable grounds to believe that Mr Al Bashir acted with genocidal intent only if the existence of such intent was the only reasonable conclusion. The Appeals Chamber finds that, although the Pre-Trial Chamber appreciated the appropriate standard to be “reasonable grounds to believe”,⁹⁶ it applied this standard erroneously. The standard it developed and applied in relation to ‘proof by inference’ was higher and more demanding than what is required under article 58 (1) (a) of the Statute. This amounted to an error of law.

IV. APPROPRIATE RELIEF

40. On an appeal under article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence).
41. In the instant case, the Pre-Trial Chamber applied an erroneous standard of proof when evaluating the evidence submitted by the Prosecutor and, consequently, rejected his application for a warrant of arrest in respect of the crime of genocide. Therefore, the decision by the Pre-Trial Chamber not to issue a warrant of arrest in respect of that crime was materially affected by an error of law. It is therefore appropriate to reverse the Impugned Decision to that extent.
42. The Appeals Chamber notes that the Prosecutor has requested the Appeals Chamber to “apply the correct standard to the facts found by the Pre-Trial Chamber, entering a finding that there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for genocide”.⁹⁷ He also requests the Appeals Chamber to “direct the Pre-Trial Chamber to issue a warrant of arrest on those counts”.⁹⁸ The Appeals Chamber is of the view that the substance of the matter should be considered by the Pre-Trial Chamber, and not by the Appeals Chamber. Therefore, the matter is remanded to the Pre-Trial Chamber for a new decision, using the correct standard of proof

⁹⁴ Impugned Decision, para. 205 (emphasis added).

⁹⁵ Impugned Decision, para. 206.

⁹⁶ See for e.g. Impugned Decision, paras 155–157.

⁹⁷ Document in Support of the Appeal, para. 65.

⁹⁸ Document in Support of the Appeal, para. 65.

Done in both English and French, the English version being authoritative.



Judge Erkki Kourula
Presiding Judge

Dated this 3rd day of February 2010

At The Hague, The Netherlands

DOCUMENT 9

On July 12, 2010, Pre-Trial Chamber I of the International Criminal Court (ICC) issued a second warrant of arrest against the President of Sudan, Omar Hassan Ahmad al Bashir. It did so after it came to the conclusion that there were reasonable grounds to add the charges of genocide to its original warrant for his arrest. The new warrant included three counts of genocide (genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction), all of which involved attacks on Fur, Massalit, and Zaghawa ethnic groups.

The second warrant proved to be a victory of sorts for ICC Prosecutor Luis Moreno-Ocampo, who had filed an appeal protesting the fact that the initial warrant issued on March 4, 2009 by the ICC judges neglected to include the charge of genocide. The Prosecutor filed his appeal on July 6, 2009, and on February 3, 2010, the Appeals Chamber rendered its judgment ("Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'") on the Prosecutor's appeal, reversing, by unanimous decision, Pre-Trial Chamber I's decision of March 4, 2009.

The ICC duly noted that "[t]his second arrest warrant does not replace or revoke in any respect the first warrant of arrest issued against Mr. Al Bashir on 4 March, 2009, which shall thus remain in effect." In the initial arrest warrant, the Chamber asserted that there were reasonable grounds to charge al-Bashir with five counts of crimes against humanity (murder, extermination, forcible transfer, torture, and rape) and two counts of war crimes (intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities, and pillaging).

The Appeals Chamber stated that the Pre-Trial Chamber had to review the case and decide "anew whether or not the arrest warrant should be extended to cover the charge of genocide." Subsequently, "applying the standard of proof as identified by the Appeals Chamber, Pre-Trial Chamber I concluded that there were reasonable grounds to believe that Mr. Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups."

Ultimately, Pre-Trial Chamber I requested that the Registrar of the Court "prepare a supplementary request for co-operation seeking the arrest and surrender of Mr. Al Bashir for the counts contained in both the first and the second warrant of arrest, and transmit such a request to the competent Sudanese authorities, to all

States Parties to the Rome Statute, and to all the United Nations Security Council members that are not States Parties to the Statute."

**SECOND WARRANT OF ARREST AGAINST OMAR
HASSAN AHMAD AL BASHIR, INTERNATIONAL
CRIMINAL COURT, JULY 12, 2010**

**Before: Judge Sylvia Steiner, Presiding Judge
 Judge Sanji Mmasenono Monageng
 Judge Cuno Tarfusser**

(PRE-TRIAL CHAMBER I of the International Criminal Court "Chamber" and "Court" respectively);

HAVING EXAMINED the "Prosecution's Application under Article 58" ("Prosecution's Application"), filed by the Prosecution on 14 July 2008 in the record of the situation in Darfur, Sudan ("Darfur situation") requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad al Bashir (hereinafter referred to as "Omar al Bashir") for genocide, crimes against humanity and war crimes;¹

HAVING EXAMINED the supporting material and other information submitted by the Prosecution;²

NOTING the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al Bashir" ("First Decision")³ issued on 4 March 2009, in which the Chamber decided:

- i. to issue a warrant of arrest against Omar al Bashir for his alleged responsibility under article 25(3)(a) of the Statute for the crimes against humanity and war crimes alleged by the Prosecution;⁴ and
- ii. not to include the counts of genocide listed in the Prosecution's Application—genocide by killing (count 1); genocide by causing serious

¹ ICC-02/05-151-US-Exp; ICC-02/05-151-US-Exp-Anxsl-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxsl & 2; and Public redacted version ICC-02/05-157 and ICC-02/05-157-AnxA.

² ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J; ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxs1-5; ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E.

³ ICC-02/05-01/09-3.

⁴ ICC-02/05-01/09-3, page 92.

bodily or mental harm (count 2); and genocide by deliberately inflicting conditions of life calculated to bring about the group's physical destruction (count 3)—among the crimes with respect to which the warrant of arrest was issued;⁵

NOTING the “Judgment on the Appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” (“Appeals Decision”) dated 3 February 2010,⁶ in which the Appeals Chamber reversed the First Decision to the extent that the Chamber “decided not to issue a warrant of arrest in respect of the crime of genocide in view of an erroneous standard of proof(. . .),”⁷ and decided not to consider the substance of the matter⁸ remanding it to the Pre-Trial Chamber “for a new decision, using the correct standard of proof”;⁹

NOTING the “Second Decision on the Prosecution’s Application for a Warrant of Arrest”,¹⁰ (“Second Decision”) in which the Chamber held that it was satisfied that there were reasonable grounds to believe that Omar Al Bashir was criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for the charges of genocide under article 6 (a), 6 (b) and 6 (c) of the Statute, which were found in that decision to have been committed by the GoS forces as part of the GoS counter-insurgency campaign, and that his arrest appeared to be necessary under article 58(1)(b) of the *Rome Statute* (“the Statute”);

NOTING articles 19 and 58 of the Statute;

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution’s Application and without prejudice to any subsequent determination that may be made under article 19 of the Statute, the case against Omar Al Bashir falls within the jurisdiction of the Court;¹¹

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution’s Application, there is no ostensible cause or self-evident factor to impel the Chamber to exercise its discretion under article 19(1) of the Statute to determine at this stage the admissibility of the case against Omar Al Bashir;¹²

⁵. Judge Anita Ušacka partly dissenting.

⁶ ICC-02/05-01/09-73.

⁷ ICC-02/05-01/09-73, page 3.

⁸ ICC-02/05-01/09-73, para. 42.

⁹ Ibid.

¹⁰ ICC-02/05-01/09-94.

¹¹ As found by the Chamber in the First Decision, see ICC-02/05-01/09-3, paras. 35–45, and reiterated in the Second Decision, para. 41.

¹² As found by the Chamber in the First Decision, see ICC-02/05-01/09-3, para. 51, and reiterated in the Second Decision, para. 41.

CONSIDERING that there are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the Government of Sudan ("GoS") issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counter-insurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008;

CONSIDERING that there are reasonable grounds to believe: (i) that a core component of the GoS counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur—belonging largely to the Fur, Masalit and Zaghawa groups—perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur; and (ii) that villages and towns targeted as part of the GoS's counter-insurgency campaign were selected on the basis of their ethnic composition and that towns and villages inhabited by other tribes, as well as rebel locations, were bypassed in order to attack towns and villages known to be inhabited by civilians belonging to the Fur, Masalit and Zaghawa ethnic groups;

CONSIDERING that there are reasonable grounds to believe that the attacks and acts of violence committed by GoS against a part of the Fur, Masalit and Zaghawa groups took place in the context of a manifest pattern of similar conduct directed against the targeted groups as they were large in scale, systematic and followed a similar pattern;

CONSIDERING that there are reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination;¹³

¹³ Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.

CONSIDERING that there are reasonable grounds to believe, as well, that as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, (i) thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of rape;¹⁴ (ii) civilians belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of torture;¹⁵ and (iii) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer;¹⁶

CONSIDERING that that there are also reasonable grounds to believe that in furtherance of the genocidal policy, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces throughout the Darfur region (i) at times, contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked;¹⁷ (ii) subjected hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of forcible transfer;¹⁸ and (iii) encouraged members of other tribes, which

¹⁴ Including in *inter alia* (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.

¹⁵ Including in *inter alia*: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality in West Darfur in February 2008.

¹⁶ Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008.

¹⁷ Physicians for Human Rights, Report, *Darfur Assault on Survival, A call for Security, Justice, and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0679 which mentions three incidents of destruction of water sources.

¹⁸ UN Security Council Press release, 22 April 2008 (Anx J38) DAR-OTP-0147-0859 at 0860; UN Security Council 5872 meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061; UNCOI Material, (Anx J72) DAR-OTP-0038-0060 at 0065; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604; United Nations Inter-agency Report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0067; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 35, 39, 44; United Nation Human Rights Council, Report on Human Rights Situations that require the Council's attention (A/HRC/6/19) (Anx 78) at D AR-OTP-013 8-0116 at 0145-

were allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups;¹⁹

CONSIDERING therefore that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport at least until the date of the Prosecution's Application, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed the crimes of genocide by killing, genocide by causing serious bodily or mental harm and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6 (a), (b) and (c) respectively of the Statute, against part of the Fur, Masalit and Zaghawa ethnic groups;

CONSIDERING that there are reasonable grounds to believe that Omar Al Bashir has been the *de jure* and *de facto* President of the Republic of the Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 until at least the date of the Prosecution's Application 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the above-mentioned GoS counter-insurgency campaign;

CONSIDERING, further, that the Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the Republic of the Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan;

CONSIDERING that, on the basis of the standard of proof as identified by the Appeals Chamber, there are reasonable grounds to believe that Omar Al Bashir acted with *dolus specialis*/ specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups;

CONSIDERING that, for the above reasons, there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect

0146; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0300, 0291-0296; Ninth periodic report of the United Nations High Commissioner for Human Rights. Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0374.

¹⁹ Witness statement (AnxJ47) DAR-OTP-0125-0665 at 0716, para.255.

perpetrator, or as an indirect co-perpetrator, under article 25(3) (a) of the Statute, for:

- i. Genocide by killing, within the meaning of article 6(a) of the Statute;
- ii. Genocide by causing serious bodily or mental harm, within the meaning of article 6(b) of the Statute; and
- iii. Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6(c) of the Statute;

CONSIDERING that, under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes;

FOR THESE REASONS,

Hereby Issues:

A WARRANT OF ARREST for OMAR AL BASHIR, a male, who is a national of the Republic of the Sudan, born on 1 January 1944 in Hoshe Bannaga, Shendi Governorate, in the Sudan, member of the Jaáli tribe of Northern Sudan, President of the Republic of the Sudan since his appointment by the RCC-NS on 16 October 1993 and elected as such successively since 1 April 1996 and whose name is also spelt Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar al-Bashir, Omar al-Beshir, Omar el-Bashir, Omer Albasheer, Omar Elbashir and Omar Hassan Ahmad el-Béshir.

Done in English, Arabic and French, the English version being authoritative.

Judge Sylvia Steiner

Presiding Judge

Judge Sanji Mmasenono Monageng

Judge Cuno Tarfusser

Dated this Monday 12 July 2010

At The Hague, The Netherlands

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About the Author

SAMUEL TOTTEN is a genocide scholar based at the University of Arkansas, Fayetteville. In 2008 he served as a Fulbright Scholar at the Centre for Conflict Management at the National University of Rwanda. In July and August of 2004, Totten served as one of 24 investigators on the U.S. State Department's Darfur Atrocities Documentation Project whose express purpose was to conduct interviews with refugees from Darfur in order to ascertain whether genocide had been perpetrated or not in Darfur. Based upon the data collected by the team of investigators, U.S. Secretary of State Colin Powell declared, on September 9, 2004, that genocide had been perpetrated in Darfur, Sudan, by Government of Sudan troops and the *Janjaweed*.

Since 2003, Totten has served as the managing editor of a series of volumes entitled *Genocide: A Critical Bibliographic Review*. Since 2005, he has served as founding co-editor of *Genocide Studies and Prevention: An International Journal*, the official journal of the International Association of Genocide Scholars. Among the books he has co-authored and co-edited on genocide are *Dictionary of Genocide* (Greenwood Publishers, 2008); *Century of Genocide: Critical Essays and Eyewitness Accounts* (Routledge, 2009); and *Genocide in Darfur: Investigating Atrocities in the Sudan* (Routledge, 2006). Currently in press is Totten's and Rafiki Ubaldo's *We Cannot Forget: Interviews with Survivors of the 1994 Rwandan Genocide* (Rutgers University Press). Totten is currently completing a book on Darfur (*The Unequivocal Genocide in Darfur*).